WSPA

Western States Petroleum Association

February 27, 2007

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Re: Comments of Western States Petroleum Association on Why the National Marine Fisheries Service Should Postpone the Issuance of the Draft Recovery Plan for Southern Resident Killer Whales and Conduct a More Open, Collaborative Recovery Planning Process

The Western States Petroleum Association ("WSPA") appreciates the opportunity to provide the National Marine Fisheries Service ("NMFS") with the following comments and information to assist NMFS in its development of a recovery plan for Southern Resident killer whales (*Orcinus orca*).[1] WSPA represents commercial marine transport companies, oil terminals, refineries, and pipelines in Puget Sound, Washington, and on the West Coast of the United States. Member companies operate marine vessels that transport a range of crude oil, petroleum products, and other economically important materials to and from ports on the West Coast. Continued safe, secure, efficient, and environmentally-responsible operation of member vessels and facilities are issues of regional and national importance.

As indicated in our previous comments, WSPA and its member companies support responsible and informed environmental stewardship.[2] However, notwithstanding WSPA's suggestions to date, NMFS has not used an open, collaborative process to develop the draft recovery plan, and as a result, the draft plan does not contain site-specific recovery actions, or objective, measurable recovery criteria as required by Section 4(f) of the ESA. In addition, NMFS' failure to adequately disclose the social, economic, and environmental impacts of critical habitat designation and recovery activities makes it impossible to evaluate whether the agency's actions will result in rationale, cost-effective programs to conserve killer whales. To remedy these errors, WSPA recommends the following:

(1) NMFS should postpone its issuance of a final recovery plan, and convene a recovery team consisting of recognized experts from public and private sectors to assist the agency in developing site-specific recovery actions, and objective, measurable recovery criteria;

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[1] See 71 Fed. Reg. 69101 (November 29, 2006).

[2] On July 3, 2006, WSPA provided preliminary comments on a draft conservation plan that NMFS previously prepared under the Marine Mammal Protection Act ("MMPA"). On August 11, 2006, WSPA provided extensive comments in response to the Agency's proposed rule to designate critical habitat for the species. We are enclosing copies of these comments for NMFS' inclusion in the administrative record for the draft recovery plan.

(2) NMFS should comply with the National Environmental Policy Act ("NEPA") by preparing an Environmental Impact Statement ("EIS") analyzing the social, economic, and environmental impacts of critical habitat designation and recovery plan activities;

(3) NMFS should coordinate its development of a killer whale recovery plan with other conservation planning activities in Puget Sound, Washington, including Chinook salmon recovery planning;

(4) NMFS should reevaluate its listing of Southern Resident killer whales in view of existing uncertainties and new information regarding the species' life history and present range; and

(5) NMFS should clarify the potential risks of oil spills, environmental contaminants, and vessel noise to avoid misinterpretation of agency conclusions.

We summarize below our specific procedural and substantive comments on the recovery plan. We would be happy to discuss these comments in more detail, and to assist NMFS in formulating a recovery plan that complies with the requirements of the ESA.

I. Procedural Comments Concerning the Draft Recovery Plan

A. Statutory Requirements for Recovery Plan Development

As explained in *Defenders of Wildlife v. Babbit*,[3] Section 4(f) of the ESA requires NMFS to develop and implement a recovery plan for the conservation and survival of listed species. A recovery plan is supposed to be a basic road map to species recovery, i.e., a process that stops or reverses the decline of a species and neutralizes threats to its existence. Such a plan must, to the maximum extent practicable, include:

(1) A description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;

(2) Objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

(3) Estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.[4]

As courts have explained, the phrase "to the maximum extent practicable" does not permit NMFS unbridled discretion; rather, it imposes a clear duty on the agency to fulfill the statutory

[3] See Defenders of Wildlife v. Babbitt, 130 F.Supp.2d 121 (D. D.C., Feb. 12, 2001).

[4] See 16 U.S.C. § 1533(f)(1)(B)(i)-(iii).

command of identifying actions, criteria, and time estimates to the extent that it is feasible or possible.[5]

In examining the requirements of ESA Section 4(f), courts have stated that NMFS shall, to the maximum extent practicable, incorporate into each recovery plan "a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species."[6] Stated differently, the ESA requires NMFS to identify site-specific actions necessary to achieve species recovery. A recovery plan that simply recognizes threats to a listed species, or identifies general classes of recovery actions, but fails to recommend specific corrective actions or explain why it is impracticable or unnecessary to recommend such actions, does not meet the requirements of the ESA.[7]

Aside from the requirement to identify site-specific actions necessary to achieve recovery, NMFS must, to the maximum extent practicable, incorporate into the recovery plan "objective, measurable criteria which, when met, would result in a determination...that the species be removed from the list."[8] The objective, measurable criteria must be directed towards the goal of removing the endangered or threatened species from the list.[9] In designing such criteria, NMFS must address each of the five statutory listing factors,[10] incorporating objective, measurable criteria to determine whether threats to the species have been ameliorated.[11]

WSPA has reviewed the draft recovery plan, and has evaluated the plan's compliance with applicable legal requirements and agency policies. We offer the following brief assessment of the draft plan to assist NMFS in its revisions, and to encourage an open dialogue on these matters.

1. The draft recovery plan fails to identify site-specific recovery actions.

Section 4(f)(1)(B)(i) of the ESA requires NMFS to identify in a recovery plan site-specific actions necessary to achieve species recovery.[12] NMFS must also explain its selection of particular actions, and provide a rational basis for its selection.

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[5] See Fund for Animals v. National Audubon Soc., 903 F.Supp. 96 (D. D.C., Sept. 29, 1995).

[6] See Defenders of Wildlife, 130 F.Supp.2d at 132; see also 16 U.S.C. § 1533(f)(1)(B)(i)

[7] See Fund for Animals, 903 F.Supp. 96.

[8] See 16 U.S.C. § 1533(f)(1)(B)(ii).

[9] See Defenders of Wildlife, 130 F.Supp.2d at 132.

[10] Such listing factors include including (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors. See 16 U.S.C. § 1533 (a)(1).

[11] Id.

[12] See 16 U.S.C. § 1533(f)(1)(B)(i).

The draft plan contains an "outline" and "description" of actions NMFS concludes necessary for species recovery. However, the general list of actions and associated narratives fail to meaningfully explain how these actions will be implemented. For example, Recovery Action 1.1.2, entitled "Support regional restoration efforts for other prey species" is explained to mean "support and conservation and recovery measures."[13] It is unclear which conservation measures NMFS intends to support, how NMFS will support such measures, and why support of such measures will in fact result in species recovery. These are details that NMFS must incorporate into each recovery action where feasible, or in the alternative, NMFS must provide a rational explanation why it is not feasible to do so. Failing to provide site-specific details defeats the usefulness of the recovery plan, and will make it impossible to use the plan as a "roadmap for species recovery" as Congress intended.

2. The draft recovery plan fails to incorporate objective, measurable recovery criteria which when met would lead to species delisting.

Section 4(f)(1)(B)(ii) of the ESA requires NMFS to identify objective, measurable criteria in a recovery plan which when met, would result in the species being delisted, or by extension, being reclassified from endangered to threatened.[14] As the courts have stated, NMFS must identify objective, measurable criteria for each of the factors that have led to the species' decline to measure whether threats to the species have been ameliorated.[15]

NMFS has identified in some detail biological criteria the listed distinct population segment ("DPS") must meet for the species to be delisted, or reclassified from endangered to threatened.[16] The delisting criteria identified by NMFS require the species to be listed for at least 28 years regardless whether threats to the species are adequately addressed prior to the expiration of this period. This delisting criterion conflicts with ESA Section 4(a) because it effectively "decouples" species abundance from the five statutory factors that NMFS must consider when listing and delisting species.[17] Stated differently, even if each of the five statutory listing factors are addressed in a time period of less than 28 years, NMFS may be precluded from delisting the species prior to the end of the 28-year period. It is highly doubtful that Congress intended this result when enacting the ESA. Such a result may also serve to discourage parties from undertaking recovery actions because NMFS has effectively eliminated the incentive of species delisting in the foreseeable near-term.

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[13] See Draft Recovery Plan at 135.

[14] See 16 U.S.C. § 1533(f)(1)(B)(ii).

[15] See Defenders of Wildlife, 130 F.Supp.2d at 133.

[16] Specifically, the DPS must exhibit an increasing population trend at an annual average growth rate of 2.3 percent per year for 28 years to warrant delisting. At this rate of increase, the population level would increase from about 81 animals in 2001 to about 155 animals by 2029. See Draft Recovery Plan at 120-121.

[17] See Defenders of Wildlife, 130 F.Supp.2d at 133; Fund for Animals, 903 F.Supp. at 111.

Aside from the structure of NMFS' delisting criteria, many of the delisting criteria associated with the five statutory listing factors are neither objective, nor are they measurable. For example, one criteria for delisting is that an "increase" in knowledge of species distribution, and habitat use species must occur.[18] It is unclear how NMFS will objectively measure such an increase – how much of an increase in knowledge is required, and how will NMFS measure this increase? This is but one example of vague criteria that are likely impossible to objectively measure. Ultimately, NMFS fails to explain in rational way how it will objectively measure threats to the species to judge when delisting or reclassification is appropriate. This is problematic, and sets up a situation where no party except NMFS knows when appropriate delisting criteria have been achieved. This result is arbitrary, and it is not consistent with the requirements of ESA Section 4(f).

3. The draft recovery plan fails to incorporate rational estimates of the time and cost of site-specific recovery actions.

Section 4(f)(1)(B)(iii) of the ESA requires NMFS to incorporate into recovery plans the time and cost required to implement site-specific recovery activities.[19] The draft plan fails to provide any discussion or analysis of time and cost estimates for recovery actions aside from conclusions contained in a table provided at the end of the document. Many of the recovery actions listed in the table contain cryptic estimates of costs, while cost estimates for several recovery actions are omitted entirely. Similarly, no discussion is provided how NMFS derived time estimates for specific recovery actions.

Estimating the time and cost of recovery activities is very important; however, NMFS appears to have spent little time or effort developing such estimates. NMFS does not explain how it has arrived at its estimates, and as a result we are unable to assess or comment upon them. This is troubling because absent reliable estimates, NMFS has not complied with the Section 4(f) of the ESA by disclosing the cost or timeline of site-specific recovery actions. These infirmities are compounded by NMFS' failure to comply with NEPA during its development of a proposed rule to designate critical habitat for the species. Such infirmities could be addressed through the development of a comprehensive EIS for both critical habitat designation and recovery plan activities.

B. <u>Process Used to Develop Recovery Plan and Critical Habitat</u>

1. While agency policies encourage the use of recovery teams and multi-species recovery plans to address species such as killer whales, NMFS has failed to follow such policies, creating the risk of inconsistent and ineffective recovery actions.

[18] See Draft Recovery Plan at 124.

[19] See 16 U.S.C. § 1533(f)(1)(B)(iii).

As NMFS itself states, it is the policy of the agency in Puget Sound to "work collaboratively with local interests on Endangered Species Act programs and recovery plans."[20] As evidence of this policy, NMFS has spent considerable time and energy working collaboratively with stakeholders in Puget Sound and other areas to develop recovery plans for listed Chinook salmon and other salmonids – a key prey species for killer whales. In view of these recent processes, it is unclear why NMFS has elected, in the face of admitted uncertainty, to prepare a recovery plan for killer whales without formulating a recovery team, soliciting input from outside experts, and conducting other scientific, environmental, and economic analyses that have been completed for Puget Sound Chiniook salmon. This obvious inconsistency raises serious questions regarding the content and sufficiency of the draft killer whale recovery plan.[21]

The interagency cooperative policy on recovery plan participation and implementation published by NMFS and the U.S. Fish and Wildlife Service ("the Services") in 1994 is instructive regarding how NMFS should proceed in the development of a recovery plan for killer whales.[22] The policy contemplates that NMFS will use "outside expertise" in the form of a recovery team to develop and implement recovery plans "that will minimize the social and economic consequences of plan implementation." The interagency policy also contemplates that NMFS will develop "multiple species plans when possible," and that NMFS will "involve representatives from affected groups" during plan development.[23] Clearly, the Services have expressed a preference to involve recovery teams in the development of recovery plans to insure such plans fully consider the social, economic, and other impacts of recovery plan implementation. Failing to make use of a recovery team in the present case, particularly in the face of NMFS' failure to prepare an EIS for killer whale critical habitat designation, limits the agency's ability to understand the true social, economic, and environmental impacts of recovery plan implementation.

As discussed above, NMFS has engaged in an extensive recovery planning process for Puget Sound Chinook salmon that has resulted in many recommendations for action. NMFS' recovery planning policies contemplate the agency will undertake multi-species recovery plans when feasible. NMFS has not explained why it is not feasible to incorporate killer whale recovery planning into the ongoing Puget Sound Chinook salmon recovery planning process.

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[20] See Policy Statement of Northwest Region Concerning ESA Recovery Planning. Available at http://www.nwr.noaa.gov/Salmon-Recovery-Planning/Recovery-Domains/Puget-Sound/PS-Chinook-Plan.cfm (as of February 19, 2007).

[21] NMFS notes in Section I of the draft recovery plan that it held a series of meetings to gather input on potential management actions to include in the MMPA conservation plan. NMFS suggests this process conducted under the MMPA satisfies its obligations under the ESA. We disagree. It is clear that a recovery plan prepared under the ESA differs markedly from a conservation plan prepared under the MMPA. Further, the economic and regulatory implications of an ESA recovery plan differ substantially from those likely to occur as a result of an MMPA conservation plan. It is disingenuous for NMFS to claim credit for public processes undertaken under the MMPA when no party participating in that proceeding had knowledge that such a plan would be used to satisfy the agency's obligations under ESA Section 4(f).

[22] See 59 Fed. Reg. 34272 (July 1, 1994). We suggest that NMFS explain in detail its basis for deviating from the final interagency policy should it chose to do so in any final recovery plan.

[23] Id.

Failing to do so may hamper attempts to fully fund and implement species recovery plans in Puget Sound due to (1) inconsistent agency priorities, (2) unclear conservation standards, and (3) a lack of a clear, unified strategy to recover both species in a timely, cost-effective manner. Going forward, WSPA remains concerned that future ESA consultation activities will become cumbersome and difficult to complete because the agency has failed to harmonize the needs of salmonids and killer whales in Puget Sound. NMFS should explain why it has elected to deviate from a multi-species approach in this case, particularly in the face of the ongoing Puget Sound Chinook salmon recovery planning process.

2. NEPA requires NMFS to develop an EIS analyzing the social, economic, and environmental impacts of critical habitat designation and recovery activities.

NEPA requires federal agencies, including NMFS, to prepare an EIS for major federal actions which will "significantly affect the quality of the human environment."[24] NMFS policies seem to suggest that the agency is not required to comply with NEPA when designating critical habitat, when preparing a recovery plan, or when otherwise taking action under the ESA that could result in substantial economic, environmental and social impacts. For example, NMFS asserts in the final critical designation that it need not comply with the requirements of NEPA when designating critical habitat, citing a single Ninth Circuit case as authority for this position.[25] NMFS' failure to comply with NEPA during critical habitat designation compounds uncertainties in the recovery planning process because no comprehensive analysis exists to evaluate or understand the social, economic and other impacts of recovery actions.[26] This outcome is wholly inconsistent with congressional intent, and as a practical matter, the agency now possesses no objective basis to know the economic, social, and other impacts of its proposed conservation activities.

NMFS' current position on the application of NEPA to critical habitat has been addressed in several court cases and legal treatises. In *Catron County v. U.S. Fish & Wildlife Service* the Court of Appeals for the Tenth Circuit held that the Services must comply with NEPA in designating critical habitat, stating that doing so will inform the public, and help ensure that critical habitat designations do not result in unintended environmental consequences.[27] In 2004 the Federal District Court for Washington D.C. similarly concluded that NEPA applies to critical habitat designations under the ESA.[28] These cases, and the analysis contained in them, indicate that NEPA does apply to critical habitat designations, and that such compliance serves an

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[24] See Catron County v. U.S. Fish & Wildlife Service, 75 F.3d 1429 (10th Cir. 1996).

[25] See 71 Fed. Reg. 69054, 69060 (November 29, 2006).

[26] Both NMFS' recovery planning policies and the ESA itself require NMFS to consider the social and economic impacts of recovery actions when developing a recovery plan. See 16 U.S.C. 1533(f). The draft recovery plan fails to discuss these impacts in any detail, and thus the draft plan likely fails to comply with the ESA.

[27] See Catron County, 75 F.3d 1429.

[28] See Cape Hatteras Preservation Alliance v. U.S. Department of *Interior*, 344 F.Supp.2d 108 (November 1, 2004).

important function of informing the public, and assisting the agency in avoiding unintended environmental consequences.[29]

Given the fact that NMFS has failed to comply with NEPA in its designation of critical habitat, NMFS should now prepare an EIS analyzing the social, economic, and environmental impacts of critical habitat and recovery plan activities. Preparing such a document at this juncture would also assist NMFS in its development of site-specific recovery actions, objective recovery criteria, and cost estimates. By developing an EIS now NMFS could also engage in a more open, collaborative process with interested parties, thus insuring any final recovery plan reflects careful consideration of economic, social, and other issues that may impact the environment and species recovery.

C. NMFS Should Reevaluate the Species Listing in View of New Information

Significant legal and scientific uncertainties exist regarding the agency's listing of Southern Resident killer whales as an endangered species. These uncertainties, and new information about the species range,[30] suggest that NMFS should reevaluate its listing determination. Such a reevaluation may yield important information that substantially impacts the pending recovery planning process.

NMFS originally determined that a listing of the Southern Resident killer whales was not warranted based on the inability to identify this population unit as a DPS as required by the ESA. Two years later, citing new genetic information and a better understanding of Killer whale population structure and putative evolutionary relationships, NMFS changed its conclusion, arguing that the Resident Group of killer whales (including the Southern Resident, Northern Resident, Southern Alaska, and Western Alaska units) were an unrecognized subspecies, and that the Southern Resident killer whales constitute a DPS of this unrecognized subspecies.

This series of actions raises a number of substantive questions. First, the ESA defines a "species" as any species, subspecies, or "distinct population segment of a species or vertebrate fish or wildlife which interbreeds when mature."[31] The ESA does not identify a DPS of a subspecies as a "species" for the purpose of listing, let alone does it contemplate the listing of a DPS of a taxonomically unrecognized subspecies. Hence, from a purely procedural standpoint, the decision to list the Southern Resident killer whales appears questionable.

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[29] See NEPA Law and Litig. § 5:11.1 (2006)(explaining that a majority of courts and legal scholars agree that designation of critical habitat requires compliance with NEPA).

[30] See San Francisco Chronicle, "5 dozen killer whales believed to be hunting salmon off S.F. coast." Available at http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/01/30/WHALES.TMP (as of February 12, 2007). This article indicates that Puget Sound Killer whales may range as far South as San Francisco, suggesting the species possesses flexible life history characteristics that enable it to adapt to changing environmental conditions. This flexibility may buffer against extinction risks, and it may provide additional insights regarding the relationship of Puget Sound killer whale populations to populations inhabiting the West Coast of the United States.

[31] See 16 U.S.C. § 1532(16).

The ESA requires NMFS to base its listing decisions on the "best available commercial and scientific information." Toward this end, NMFS convened a workshop on, "Shortcomings of Cetacean Taxonomy in Relation to Needs of Conservation and Management," [32] a title that by itself suggests a interesting bias regarding the purpose and function of taxonomy in biology. During the workshop, the participants broke out into several topical working groups, including a "Working Group on Killer Whales as a Case Study." However, the working group made little progress on the identification of killer whale subspecies. Those participants who thought that more than one species exists also felt that, until the species question can be resolved, it would be appropriate to recognize a series of subspecies to reflect clear differences among types of killer whales. Overall, a majority of participants felt that Resident- and Transient-type killer whales in the Eastern North Pacific probably merit at least subspecies status, although questions of how to delineate sympatric sub-species would remain.

In reviewing this report, and considering the different perspectives of the participants, it is clear that there was no scientific consensus on the taxonomy of killer whales. Further, in the "Report of the Working Group on Species- and Subspecies-Level Taxonomy" from this same workshop, the subspecies concept was referred to as having a "perplexing and confusing history."[33] It was also noted that "its [the subspecies] inherently non-rigorous nature continues to plague taxonomic discourse and, by some views, hinders conservation."[34] Lastly, the report notes that "strict quantitative criteria for subspecies have never been applied to cetaceans."[35] For NMFS to identify Eastern North Pacific Resident killer whales as a "subspecies," and the Southern Resident killer whales as a DPS of the subspecies is at best a questionable application of science in view of the remaining scientific debate on this matter. The record before the agency strongly suggests that NMFS should reevaluate its listing determination, and determine whether Southern Resident killer whales constitute a DPS of a recognizable species in accordance with the express language of the ESA.[36]

Given remaining uncertainties with the listing of killer whales in Puget Sound, NMFS should reconvene its Biological Review Team and clarify whether the best available scientific and commercial information indicates that Southern Resident killer whales are a DPS of the killer whale species. NMFS could easily undertake this assessment in the context of developing an EIS for critical habitat and recovery plan development, and if NMFS determines that the species does not warrant listing, NMFS could reach that conclusion prior to identify specific actions needed to recover the species.

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[32] See Reeves, R.R., W.F Perrin, B.L. Taylor, C.S. Baker and S.L. Mesnick (Editors), *Report of the Workshop on Shortcomings of Cetacean Taxonomy in Relation to Conservation and Management, April 30-May 2, 2004, LaJolla, California*, NOAA-TM-NMFS-SWFSC-363, Southwest Fisheries Science Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, LaJolla, CA (2004).

[33] Id. at Appendix 5.

[34] Id.

[35] Id.

[36] See 16 U.S.C. § 1532(16)(defining the term "species" to mean a DPS of a species).

III. Substantive Comments Concerning Draft Recovery Plan

A. The Plan Fails to Include an Objective Risk Analysis

As WSPA previously stated in its comments on the proposed conservation plan prepared under the MMPA, the draft conservation/recovery plan and listing documents contain a reasonably thorough analysis of killer whale life history and other relevant background information. However, the conservation plan, and now the draft recovery plan, omits key information and analysis. In particular, the draft plan makes broad generalizations about potential risks to the species without any meaningful analysis of these risks. For example, the draft plan portrays the risk of oil spills in Puget Sound as a significant risk to the species; however, the Plan does not adequately analyze the probability of oil spill events in Puget Sound, nor does it adequately consider the myriad of shipping and environmental laws, regulations, policies, and programs that have been successfully implemented to address such risks. As a result, the draft plan does not accurately assess the risk of oil spill events, inviting the agency and other parties to invest limited resources in areas that are comprehensively and successfully addressed.

WSPA remains concerned that many of the statements about risk contained in the draft recovery plan could be interpreted as requiring additional, and potentially costly regulatory actions that are not necessary. Absent an objective, risk-based analysis, NMFS will be unable to prioritize site-specific actions that will achieve species recovery. WSPA and its members have substantial experience conducting these types of analyses – yet another reason for NMFS to engage in an open, collaborative recovery planning process in conjunction with industry and other stakeholders. Such a process would result in the development of a more thorough and balanced recovery plan that the agency and stakeholders could use to effectively achieve species recovery.

B. Comments on Potential Threats to the Species

1. The draft recovery plan does not make use of the best available scientific and commercial information, and should be revised to reflect recently-implemented oil spill response, prevention, and preparedness programs.

NMFS states that due to the volume of shipping traffic in Puget Sound, the possibility of a large spill remains one of the most important short-term threats to killer whales and other coastal organisms in this region.[37] NMFS relies extensively on Neel et al. (1997)[38] in its characterization of oil spill risks in Puget Sound; however, this paper relies on studies that are out-dated, and not reflective of current regulatory programs and recent oil spill information. NMFS also recommends, without analysis or citation, that improvements are needed in spill prevention, response, and preparedness programs in Washington to minimize the effects of oil

[37] See Proposed Recovery Plan at 112.

[38] See J. C. Neel, D. Hart, S. Lynch, S. Chan, and J. Harris, "Oil spills in Washington State: a historical Analysis," WDOE Publication 97-252 (1997).

spills on Southern Resident killer whales.[39] It is unclear how NMFS arrived at these conclusions given that it appears NMFS never consulted with the State of Washington or industry regarding these recommendations.

WSPA disagrees with NMFS' overly-broad characterization of oil spill risk, and believes that a properly-conducted oil spill risk assessment would reveal that the risk of a catastrophic oil spill event in Puget Sound is not reasonably foreseeable in view of existing regulatory measures and programs. As outlined in WSPA's previous comments,[40] and a 2006 report from the Washington Department of Ecology ("DOE"),[41] a host of overlapping, sophisticated, and in some cases, redundant, regulatory measures exist that have dramatically reduced the occurrence and probability of oil spill events in Puget Sound. Over the past 20 years, federal, State, and international programs have undergone continuous refinement and revision in response to continuous evaluation of safety standards. These measures, coupled with industry-initiated practices, have resulted in dramatic decreases in oil spill events from large, commercial vessels in Puget Sound. For example, from 1970's through the 1990's, there was a 94% reduction in average annual oil spill volumes from all vessel types.[42] More recently, during the period from 1998 to 2006, DOE reports that oil spill incidents declined to less than 0.5% of all transits due to improved compliance by large vessels, and increased frequency of inspections.[43] Such information indicates a small and decreasing risk of oil spill events attributable to large, commercial vessels in Puget Sound, Washington.

Aside from available evidence that suggests a small and decreasing risk of oil spill events, a number of regulatory measures were implemented in 2006 to address oil spills in Puget Sound, Washington. In its 2006 annual report, DOE summarizes State spill prevention, preparedness, and response activities that the agency enacted in 2006 to reduce the risk and impact of oil spills in Washington. Such activities include (1) funding of a rescue tug in Neah

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[39] See Proposed Recovery Plan at 141. NMFS also states that "much better contingency planning, more training, and frequent reevaluation of response efforts" are needed improve oil spill response. NMFS provides no basis for this conclusion, nor does the agency identify site-specific actions to address these purported infirmities. The agency also fails to identify objective, measurable criteria industry could implement to judge when purported infirmities are adequately addressed. Judging by the vague criticism of oil spill preparedness measures, WSPA is left with the impression that NMFS does not fully appreciate the scope and requirements of oil spill prevention and response programs in Puget Sound, Washington.

[40] See Letter from Frank Holmes, WSPA, and Mike Moore, Pacific Merchant Shipping Association ("PMSA"), to NMFS (July 3, 2006). In this letter, WSPA and PMSA outline in detail the range of state, federal and international oil spill programs presently being implemented in Puget Sound, Washington. A copy of this letter is included for your reference and inclusion in the administrative record for this proceeding.

[41] See Washington State Department of Ecology, "Spill Prevention, Preparedness, and Response Program 2006 Annual Report," WDOE Publication 07-08-002 (February 2007). We have enclosed a copy of this report for your reference.

[42] See U.S Coast Guard Oil Spill Compendium (2001). Available at http://www.uscg.mil/hq/g-m/nmc/response/stats/aa.htm (as of February 12, 2007).

[43] See Washington State Department of Ecology, "Spill Prevention, Preparedness, and Response Program 2006 Annual Report," at 7-9.

Bay which began service on January 1, 2007; (2) adopting new oil spill contingency plan rules in October, 2006, to make spill management teams and response equipment rapidly available to aggressively respond to spills; (3) updating the Northwest Contingency Plan to coordinate oil spill response efforts between the State and federal government; (4) improving geographic response plans that address areas containing sensitive natural, cultural or economic resources; and (5) establishing a new oil spill transfer program and adopting oil transfer regulations in September, 2006.[44]

The recently-adopted oil spill transfer program constitutes a significant new regulatory measure that expands the number of commercial operations regulated by DOE's oil spill program.[45] Previously, DOE only regulated major maritime shipping operations and large facilities such as oil refineries. The new spill prevention rules provide broad coverage relating to oil that is transferred in bulk over state waters. Under the new transfer rules, DOE recognizes four classes of regulated oil facilities, including (1) major refineries and large facilities; (2) fuel trucks; (3) terminals and fuel vessels; and (4) marinas with fuel docks.[46] Each type of facility has planning and operational requirements specific to its operations. All facilities must also meet new equipment, reporting, preventative maintenance, and operational requirements. To implement the new rules, DOE has also added six new inspectors to oversee oil transfers throughout the state, including in the Strait of Juan de Fuca and Puget Sound.

As the information provided above indicates, a host of regulatory measures address the risk of oil spill events in Puget Sound, Washington. Existing State, federal, international, and industry-initiated processes have reduced oil spill events and risks to extremely low levels. Such regulatory processes are continuously updated, and are implemented with the collaboration of government and industry. Recently-adopted regulatory measures further reduce risk, and bolster prevention and preparedness. In view of these considerations and successes, NMFS should reassess its statements and recommendations regarding Washington oil spill programs. NMFS should also evaluate more recent information from DOE and WSPA prior to recommending site-specific actions and measurable criteria to improve such programs.

2. The draft recovery plan does not identify site-specific actions to address environmental contaminants, nor does it provide a rational basis to require changes in State water quality programs.

(a) PCBs and DDT

The draft recovery plan identifies the bioaccumulation of organochlorines, such as PCBs, DDT, and some other pesticides, as posing the greatest contaminant risk to killer whales, and most of the draft plan's discussion of risks posed by contaminants is focused on these compounds. Since neither PCBs nor DDT remain in use in the Puget Sound region, addressing

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[44] Id. at 6-10.

[45] Id. at 6.

[46] Id.

the threats posed by these contaminants is likely to require focused actions and specialized responses. However, the plan fails to include such site-specific actions to address these concerns. For example, Recovery Action 1.2.2 simply calls for minimizing continued input of contaminants to the environment, and Recovery Action 1.2.2.1 calls for revising water and sediment quality standards and upgrading wastewater treatment systems and pretreatment programs.[47]

The draft plan does not provide a rational basis to require wholesale revisions to water quality standards and wastewater treatment systems. The draft plan also fails to explain how these changes would address PCBs and DDT - substances which persist in the environment but as already noted, are no longer in use. Similarly, no case has been made for sweeping changes to water quality and wastewater treatment standards to respond to emerging contaminants, like PBDEs. NMFS should focus any contaminant-related conservation measures on specific responses to the contaminants of concern.

(b) PAHs

WSPA concurs with NMFS' assessment that compounds such as PCBs and DDT are more likely to result in affects to killer whales and their primary prey then PAHs which have not been shown to adversely affect killer whales or their prey. Trophic level increases of PAHs through biomagnification have not been observed in aquatic ecosystems because PAHs are commonly metabolized. Consequently, PAHs are not available to top predators such as killer whales. In any case, fish species with the highest potential to be contaminated are bottom fish, which contribute very little to the Southern Resident killer whale diet.[48] These conclusions are supported by research conducted by the British Columbia Department of Fisheries and Oceans on contaminant levels in Southern Resident killer whales, which found extremely high levels of PCBs and DDTs and lower levels of dioxins and furans, but did not report finding PAHs.[49]

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[47] See Draft Recovery Plan at 137-138.

[48] See Draft Recovery Plan at 21 (noting that salmon are the preferred prey of resident killer whales).

[49] See M. Schmidt and P. Johnson, "Toxics in the Puget Sound Food Web," People for Puget Sound (2001). According to this report, the Southern Resident killer whale population has a high level of chemical contamination but the detectable chemicals have not been reported to include PAHs. Research by the British Columbia Department of Fisheries and Oceans found PCBs and DDTs at extremely high levels, lower levels of dioxins and furans, and higher levels of PCB and DDT in males than females, suggesting females excrete over 60% of their chemical residues through nursing. They did not report finding PAHs.

3. Available scientific and commercial information indicates that noise associated with commercial cargo vessels does not harm killer whales, and NMFS has failed to consider the cost of regulatory restrictions on cargo vessel transiting through Puget Sound, Washington.

The draft recovery plan suggests that vessel noise may be detrimental to killer whale survival by impairing foraging and other behavior patterns. NMFS recommends that the presence and activity patterns of non-whale-watching vessels in the vicinity of Southern Resident and other killer whales should be evaluated to determine their potential effect. NMFS also suggests the need to restrict vessel traffic or establish regulations regarding vessel activity in the vicinity of killer whales.

The impacts of vessel noise on killer whales, particularly noise associated with large cargo vessels, is poorly understood, and threshold levels at which underwater sounds become harmful are unknown. In 2003 the National Research Council ("NRC") concluded that no documented evidence exists of ocean noise being the direct physiological agent of marine mammal death under any circumstances.[50] The long-term effects of ambient noise on marine organisms are even less well understood.

No evidence currently exists to suggest that noise associated with large cargo vessels or oil tankers causes harm to killer whales. As NMFS explains in the draft recovery plan, large cargo vessels produce low frequency sound in the range of 5 to 500 Hz.[51] Conversely, killer whale hearing sensitivity ranges from 1 to 120 kHz with peak sensitivities from 20 kHz to 50 kHz - well above the range of sound produced by commercial cargo vessels.[52] These data indicate that noise associated with commercial cargo vessels and oil tankers does not impact the species.

Container and tanker vessel movements are highly regulated by numerous federal laws and international treaties. Vessel movements and shipping lane operations in general implicate important national security considerations and international agreements. NMFS' legal authority to regulate in this complex legal environment is at best unclear. Any proposed recovery actions contemplating regulation of container and tanker vessel movements should carefully evaluate these issues through discussions with the State Department, the Defense Department, and the shipping industry to ensure that any recovery plan or recommendations for regulatory actions reflect a realistic assessment of actions that can in fact be implemented.

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[50] See National Research Council, *Ocean Noise and Marine Mammals*, Committee on Potential Impacts of Ambient Noise in the Ocean on Marine Mammals (2003).

[51] See Draft Recovery Plan at 108 (citing National Research Council).

[52] Id. at 109.

Establishing regulations that restrict commercial vessel operations in Puget Sound, Washington, could have significant economic and safety implications for vessel traffic in this region. Safe and efficient movement of cargo to the Port of Seattle, Port of Tacoma, and oil refineries is an important regional issue, with potential national and international implications. NMFS should avoid implementing programs or regulations that impact commercial shipping unless and until NMFS evaluates in detail the legal, social, economic, and environmental impacts of such programs or regulations.

IV. Summary and Recommendations

In view of the considerable uncertainty surrounding killer whale conservation and recovery, WSPA urges NMFS to postpone issuance of a final recovery plan, and engage in a more open, collaborative recovery planning process consistent with current agency policies and practices. Doing so will help insure that NMFS fully considers the environmental and economic impacts of killer whale recovery actions consistent with the legal requirements of the ESA.

WSPA encourages NMFS to comply with NEPA by preparing an EIS analyzing the social, economic and environmental impacts of critical habitat designation and recovery plan activities. Doing so will inform agency decisionmaking, and it will enable full and complete public disclosure of the potential impacts of agency actions. WSPA stands ready to assist NMFS in this matter, and looks forward to playing an important role in the conservation of marine resources in Puget Sound, Washington.

Thank you for the opportunity to provide comments and recommendations on the draft recovery plan, and we appreciate your inclusion of these materials in the administrative record for this proceeding. Please feel free to contact me at (360) 352-4506 if you have any questions regarding these comments or recommendations.

Sincerely,

Frank E Holmes

Frank E. Holmes, Northwest Manager
Western States Petroleum Association

Enclosures

Cc: Vice Admiral Conrad Lautenbacher (Ret.), NOAA Administrator
Undersecretary of Commerce for Oceans and Atmosphere

Dr. William Hogarth, Assistant Administrator for Fisheries

✓ Robert Lohn, Regional Administrator
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Jay Manning, Director
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August 11, 2006

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Re: Proposed Rule to Designate Critical Habitat for Southern Resident Killer Whales; RIN 0648-AU38

To Whom It May Concern:

The Western States Petroleum Association ("WSPA") appreciates the opportunity to provide the National Marine Fisheries Service ("NMFS") with the following comments and information to assist NMFS in its development of a final rule to designate critical habitat for Southern Resident killer whales (*Orcinus orca*). *See* 71 Fed. Reg. 34572 (June 15, 2006). WSPA represents commercial marine transport companies, oil terminals, refineries, and pipelines in Puget Sound, Washington, and on the West Coast of the United States. Member companies operate marine vessels that transport a range of crude oil, petroleum products, and other economically important materials to and from ports on the West Coast. Continued safe, secure, efficient, and environmentally-responsible operation of member vessels and facilities are issues of regional and national importance.

WSPA and its member companies strongly support environmental stewardship and species conservation. However, significant questions and uncertainties exist regarding the recent listing of Southern Resident killer whales as "endangered" under the ESA and the current proposal for designation of critical habitat. In addition, the potential exists for a critical habitat designation to result in unintended impacts upon national security, military preparedness, and the regional economy. These issues, coupled with remaining legal uncertainties concerning the agency's interpretation of the term "adverse modification" contained in the ESA, indicate the need for a more critical and measured look at the areas designated for critical habitat.

I. NMFS Should Exclude Areas Around Cherry Point and March's Point, Washington, from Critical Habitat under ESA Section 4(b)(2) Due to National Security and Other Considerations

Section 4(b)(2) of the ESA requires NMFS to balance the benefits of critical habitat designation against economic, national security, and other benefits of exclusion. *See* 16 U.S.C. § 1533(b)(2). NMFS retains discretion to exclude an area from critical habitat designation if the agency determines, based upon the best available scientific and commercial data, that the

benefits of exclusion outweigh the benefits of designation, and that such an exclusion will not result in species extinction. *See* 50 C.F.R. § 424.19.

NMFS proposes to exclude certain military sites in Puget Sound due to potential impacts on military readiness, such as preventing, restricting or delaying access to sites; restricting activities associated with vessel or facility maintenance; and delaying response times for ship deployments and overall operations. NMFS determined that the areas proposed for exclusion represent relatively small percentages of the total habitat area, and that based on important national security considerations, the benefits of exclusion outweigh the benefits of designation.

For reasons similar to those enumerated by the U.S. Navy, WSPA requests that NMFS exclude from critical habitat designation certain areas around key, strategic refinery facilities in Puget Sound. Specifically, these areas include (1) marine waters and shoreside areas in Puget Sound, adjacent to Cherry Point, Washington; and (2) marine waters and shoreside areas in Fidalgo and Padilla Bays, adjacent to March's Point, Washington; and (3) marine waters and shoreside areas near the Blair Waterway, adjacent to Tacoma, Washington. Appendix A illustrates the geographic locations and dimensions of areas proposed for exclusion from critical habitat.

Several of the affected refinery facilities and their operational areas are adjacent to or overlapping with proposed critical habitat. Some facilities and operational areas occur in less than 20 feet of water, an area proposed for exclusion from critical habitat. However, due to mapping imprecision, we cannot determine the extent to which shore-based facilities may extend into 20-foot deep waters of Puget Sound and therefore the exact amount of overlap with proposed killer whale critical habitat is unknown. WSPA proposes to exclude certain refinery areas that clearly include waters deeper than 20 feet. The sites proposed for exclusion constitute less than 2 percent of the total area proposed as critical habitat for the species (about 39 square miles out of a total of 2,676 square miles). The shore-based sites proposed for exclusion constitute less than 2 percent of the total shoreline area contained in proposed critical habitat areas (about 36 linear miles of shoreline out of a total of 2,081 miles).

A. Petroleum Refinery Facilities Located in Puget Sound, Washington

Two refineries in the vicinity of Cherry Point, Washington – one operated by ConocoPhillips ("Conoco") and the second operated by British Petroleum ("BP"). Conoco's facility processes about 100,000 barrels of crude oil per day into critical transportation fuels. BP's facility, located adjacent to the Conoco facility, is the fourth largest refinery on the West Coast, processing more than 200,000 barrels of crude oil each day. These facilities produce jet fuel for commercial and defense aircraft. Some of the crude oil used by these facilities is transported from Alaska and overseas in doubled-hulled tanker ships. Refined products are transported via pipeline, barges, tanker trucks, and marine tankers to military bases, regional airports, and other facilities.

Two refineries are located on March's Point, near Anacortes, Washington - one operated by the Tesoro Refining and Marketing, and a larger one operated by Shell Oil Company. The refineries are located in Skagit County on March's Point which extends into Fidalgo Bay to the

west and Padilla Bay to the east. Crude oils processed at the plants comes primarily from Alaska's North Slope via tanker ships from the Alaska pipeline terminus at Valdez, and from Canada via a pipeline connected to the oil fields of Alberta. The refineries process a combined 255,000 barrels of crude oil per day, producing gasoline, jet fuel, propane, diesel, petroleum coke, and other fuels for markets mostly within Washington State and on the West Coast. Refined products are transported via pipeline, tanker trucks, and marine tankers to military bases, regional airports, and other facilities.

U.S. Oil & Refining Company operates a refinery and marine terminal within the tideflats industrial area located in Tacoma, Washington. The refinery processes about 40,000 barrels of crude oil per day to produce gasoline, diesel fuel, jet fuel, marine fuel, gas oils, and asphalt. Crude oil arrives by tanker ships and barges at the company's dock on the Blair waterway. Refined products are transported via pipeline, tanker trucks, rail, marine tankers and barges to military bases, regional airports, and other facilities. The McChord Pipeline, a pipeline that originates at the refinery and terminates at storage tanks located on McChord Air Force Base, supplies jet fuel to this military installation.

B. National Security Implications of Designation

As explained above, refinery facilities located at Cherry Point, March's Point, and Tacoma, Washington, supply petroleum products for a range of military uses. Specifically, refinery facilities in Washington State supply jet fuel and ship fuel to the U.S. Navy, U.S. Coast Guard, and U.S. Air Force. These branches of the military protect strategic areas in the Northwest, including ports, cities, and sensitive waterway areas. Beyond the region, McChord Air Force Base, home of the 62nd Airlift Wing, supports worldwide humanitarian and combat missions of international significance. Refinery operations, and associated fuel production, are thus critical to military readiness and preparedness.

Similar to concerns expressed by the U.S. Navy, WSPA believes that a critical habitat designation near the refineries could pose an unacceptable detriment to facility capabilities to adequately support security, maintenance, operations, and emergency preparedness. Refinery operations require unimpeded access to nearshore marine areas by a range of vessels for safety, security, maintenance, and normal facility operations. Any restrictions that adversely impact arrival, departure, or operations may significantly impact facility production and security, thereby limiting the ability of these facilities to supply fuel products to the U.S. military. Such restrictions may thus impact military readiness, and may pose security risks to the facilities themselves.

C. Impacts of Designation

As NMFS states in its ESA Section 4(b)(2) Report and related analyses, estimating the economic impact of critical habitat designations on water quality management, oil spill regulation, and other activities is difficult as it is unclear what contaminant thresholds NMFS may apply, the geographic scope of analysis, the regulatory meaning of adverse modification, and market variables. Notwithstanding these uncertainties, the potential exists for significant impacts on refinery operations and the region as a whole in the event that crude oil shipments are

delayed, or refinery production is curtailed, resulting in reduced petroleum supplies in the Pacific Northwest and along the West Coast.

D. Exclusion will not Result in Species Extinction Due to the Small Size of Proposed Exclusions and Remaining Protections

WSPA proposes the exclusion of certain sites that clearly include waters deeper than 20 feet. These sites encompass about 39 square miles out of about 2,676 square miles of marine area proposed as critical habitat for the species (Appendix A). The shore-based sites cover about 36 linear miles of shoreline out the total 2,081 miles of shoreline in the proposed critical habitat areas (Appendix A). The proposed exclusions would result in removing less than 2 percent of proposed marine areas, and less than 2 percent of proposed shoreline areas from critical habitat designation. While these areas may have conservation value, excluded habitat constitutes a very small percentage of the proposed critical habitat for the species.

As NMFS itself has recognized both in the proposed rule, and in statements made at public hearings, the exclusion of areas from critical habitat designation does not eliminate ESA protections for the species in these waters. Even when an area of habitat is not designated as critical habitat, federal agencies must insure their actions avoid jeopardizing listed species. Further, activities that are conducted outside of critical habitat must avoid indirect effects that result in jeopardy.

NMFS previously designated critical habitat for chinook salmon in Puget Sound, Washington. Consequently, federal agencies must avoid adversely modifying critical habitat for this species. Designated chinook salmon critical habitat overlaps with proposed Southern Resident killer whale critical habitat in many areas, including areas near Cherry Point, March's Point, and the Blair Waterway. These existing critical habitat designations, and associated ESA Section 7 consultations that occur, reduce the benefits of killer whale critical habitat designation.

Based upon the foregoing analysis, the benefits of excluding from critical habitat areas near refinery facilities at Cherry Point, March's Point, and the Blair Waterway, Washington, outweigh the benefits of inclusion. Given existing protections and the small area proposed for exclusion, excluding these areas will not result in species extinction.

II. Available Information Supports Exclusion of Areas Less than 20 Feet in Depth

NMFS proposes to exclude marine areas less than 20 feet in depth from critical habitat because Southern Resident killer whales are seldom observed at these depths, and the species grows to a size that likely limits its maneuverability in such areas. NMFS states these shallow areas are outside the geographic range presently occupied by the species, and that such areas are not necessary for species conservation.

WSPA agrees with NMFS that marine areas less than 20 feet in depth are outside the species' current range, and are not otherwise essential for the conservation of killer whales in Puget Sound, Washington. Available information indicates that Southern Residents feed primarily on salmon, and do not enter shallower areas to capture seals and sea lions. While

anecdotal information may indicate that the species infrequently occurs in marine area less than 20 feet in depth, such infrequent sightings do not mean that these areas are essential to the conservation of the species. *See* 16 U.S.C. § 1532(5). Rather, infrequent sightings suggest such areas are not essential for species conservation due to the species limited use of these areas. Further, available biological information indicates that such areas do not contain prey, or other physical or biological features that are essential for species conservation.

III. Sound as a Primary Constituent Element of Critical Habitat

In its proposed rule, NMFS concludes that sound does not constitute a primary constituent element of killer whale critical habitat. The Agency requests comments to assist it in evaluating whether sound constitutes a principal physical or biological feature that is essential for the conservation of the species, and that may require special management considerations.

WSPA agrees with NMFS that sound does not constitute a principal physical or biological feature that is essential for species conservation. As the ESA implementing regulations indicate, the Services have not as a legal mater considered sound to constitute a principal constituent element of critical habitat. *See, e.g.,* 50 C.F.R. § 424.12(b)(providing a list of physical and biological features essential to species conservation, and excluding sound from same). Rather, such habitat elements include discrete habitat features such as nesting sites, feeding sites, and water quality that can be readily identified, and where necessary, appropriately managed.

Aside from this regulatory issue, the impacts of noise on killer whales, particularly noise associated with large cargo vessels, is poorly understood, and threshold levels at which underwater sounds become harmful are unknown. In 2003 the National Research Council concluded that no documented evidence exists of ocean noise being the direct physiological agent of marine mammal death under any circumstances.[1] Based on lengthy review and deliberation, the National Research Council concluded the following:

> *Short-and long-term effects on marine mammals of ambient and identifiable components of ocean noise are poorly understood. There is no documented evidence of ocean noise being the direct physiological agent of marine mammal death under any circumstances.*

A similar conclusion regarding the effects of acoustic noise on marine mammals was drawn in the "Final Report of the National Oceanic and Atmospheric Administration International Symposium: Shipping Noise and Marine Mammals: A Forum for Science, Management, and Technology," held in May 2004. While this report acknowledges that there is a potential for shipping noise to impact marine mammals by elevating ambient noise levels to the point of interfering with or masking biologically important signals, no rigorous proof exists that this is occurring. In fact, among the research priorities identified by the symposium participants were (1) investigation of behavioral responses of marine animals to periods of increased ambient

[1] National Research Council, *Ocean Noise and Marine Mammals*, Committee on Potential Impacts of Ambient Noise in the Ocean on Marine Mammals (2003).

noise levels (from both natural and anthropogenic factors), including changes in calling characteristics and other acoustic displays; and (2) evaluation of the biological significance of vessel noise exposure...to include comparative assessments of population demographics rates and vital functions in areas of relatively high and low commercial shipping density.

In view of the intent expressed in the Services' ESA regulations and the lack of any scientific evidence indicating that noise constitutes an essential habitat feature requiring special management consideration, NMFS should exclude noise from consideration as a primary constituent element of critical habitat.

IV. NMFS Should Delay Critical Habitat Designation Pending the Reevaluation of the Listing, Clarification of the Meaning of Adverse Modification, and Compliance with the National Environmental Policy Act

A. Uncertainty Remains Regarding Whether the Listed Unit Constitutes a Distinct Population Segment ("DPS")

As evidenced by pending litigation, significant legal and scientific uncertainties exist regarding the agency's listing of Southern Resident killer whales as an endangered species. *See Washington State Farm Bureau v. National Marine Fisheries Service*, No. 2:06-cv-00388-TSZ (W.D. Washington)(challenging species listing). These uncertainties suggest that NMFS should delay designating critical habitat for the species until the agency reevaluates its listing determination. Such a reevaluation may yield important information that substantially impacts the pending critical habitat designation process.

By way of background, NMFS originally determined that a listing of the Southern Resident killer whales was not warranted based on the inability to identify this population unit as a Distinct Population Segment as required by the ESA. Two years later, citing new genetic information and a better understanding of *Orcinus orca* population structure and putative evolutionary relationships, NMFS changed its conclusion, arguing that the Resident Group of killer whales (including the Southern Resident, Northern Resident, Southern Alaska, and Western Alaska units) were an unrecognized subspecies, and that the Southern Resident killer whales constitute a DPS of this unrecognized subspecies.

This series of actions raises a number of substantive questions. First, the ESA defines a "species" as any species, subspecies, or "distinct population segment of a species or vertebrate fish or wildlife which interbreeds when mature." *See* 16 U.S.C. § 1532(16). The ESA does not identify a DPS of a subspecies as a "species" for the purpose of listing, let alone does it contemplate the listing of a DPS of a taxonomically unrecognized subspecies. Hence, from a purely procedural standpoint, the decision to list the Southern Resident Killer whales appears questionable.

The ESA requires NMFS to base its listing decisions on the "best available commercial and scientific information." Toward this end, and likely in response to the legal challenge and remand of the original NMFS decision that listing was not warranted, NMFS convened a workshop on, "Shortcomings of Cetacean Taxonomy in Relation to Needs of Conservation and

Management,"[2] a title that by itself suggests a interesting bias regarding the purpose and function of taxonomy in biology. During the workshop, the participants broke out into several topical working groups, including a "Working Group on Killer Whales as a Case Study." However, the working group made little progress on the identification of killer whale subspecies. Those participants who thought that more than one species exists also felt that, until the species question can be resolved, it would be appropriate to recognize a series of subspecies to reflect clear differences among types of kill whales. Overall, a majority of participants felt that Resident- and Transient-type killer whales in the Eastern North Pacific probably merit at least subspecies status, although questions of how to delineate sympatric sub-species would remain.

In reviewing this report, and considering the different perspectives of the participants, it is clear that there was no scientific consensus on the taxonomy of killer whales. Further, in the "Report of the Working Group on Species- and Subspecies-Level Taxonomy" from this same workshop (reported in Appendix 5, Reeves et al. 2004), the subspecies concept was referred to as having a "perplexing and confusing history." It was also noted that "its [the subspecies] inherently non-rigorous nature continues to plague taxonomic discourse and, by some views, hinders conservation." Lastly, the report notes that "strict quantitative criteria for subspecies have never been applied to cetaceans." For NMFS to identify Eastern North Pacific Resident Killer Whales as a "subspecies," and the Southern Resident Killer Whales as a DPS of the subspecies is at best a questionable application of science in view of the remaining scientific debate on this matter. The record before the agency strongly suggests that NMFS should reevaluate its listing determination, and determine whether Southern Resident Killer Whales constitute a DPS of a recognizable species in accordance with the express language of the ESA. *See* 16 U.S.C. § 1532(16)(defining the term "species" to mean a DPS of a species).

B. Uncertainty Remains Regarding the Meaning of Adverse Modification

While the proposed rule and statements made by NMFS appear to suggest that the designation of critical habitat results in few, if any, economic or other impacts, this analysis is, at best, speculative in view of the Services' failure to promulgate a lawful regulatory definition of the term "adverse modification" under the ESA. In 2004, the Ninth Circuit Court of Appeals found the Services' definition of adverse modification inconsistent with the statute. *See Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004). Prior to this case, other Courts of Appeal similarly found the Services' definition of adverse modification invalid. *See Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434, 441-42 (5th Cir. 2001). Notwithstanding the fact that two separate Courts of Appeal have invalidated the Services' definition of adverse modification, the Services have failed to so much as propose a revised regulation, leaving the public with no way of knowing how the Services intend to interpret this term, or what the actual impacts of a critical habitat designations may be. Such uncertainties underscore the need for NMFS to undertake a more rigorous environmental analysis of the proposed designation as suggested below.

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[2] Reeves, R.R., W.F Perrin, B.L. Taylor, C.S. Baker and S.L. Mesnick (Editors), *Report of the Workshop on Shortcomings of Cetacean Taxonomy in Relation to Conservation and Management, April 30-May 2, 2004, LaJolla, California*, NOAA-TM-NMFS-SWFSC-363, Southwest Fisheries Science Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, LaJolla, CA (2004).

Given the uncertainties involved, it would seem prudent for the Services to first define the meaning of adverse modification, including how it will be applied in future ESA Section 7 consultations, prior to designating critical habitat. Absent such a definition, it is impossible to meaningfully evaluate the economic, environmental, or national security impacts of the current proposal. Upon the Services' eventual enactment of a valid definition of the term, NMFS may be required to reevaluate its final designation to reassess economic and other impacts, and admittedly poor use of limited agency resources.

C. NMFS Has Failed to Comply with the National Environmental Policy Act

The National Environmental Policy Act ("NEPA") requires federal agencies to prepare an environmental impact statement for major federal actions which will significantly affect the quality of the human environment. In the proposed rule, NMFS asserts that it need not comply with the requirements of NEPA when designating critical habitat, citing *Douglas County v. Babbitt*[3] as authority for this position. *See* 71 Fed. Reg. 34571, 34586 (June 15, 2006). NMFS fails to discuss the reasoning behind *Douglas County v. Babbitt*, the status of other court cases that have addressed this issue, or whether circumstances may dictate NEPA compliance in this particular case.

Contrary to NMFS' position, considerable disagreement exists regarding the applicability of NEPA to critical habitat designations. In *Catron County v. U.S. Fish & Wildlife Service* the Court of Appeals for the Tenth Circuit held that the Services must comply with NEPA in designating critical habitat, stating that doing so will inform the public, and help ensure that critical habitat designations do not result in unintended environmental consequences. *See Catron County v. U.S. Fish & Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996). In 2004 the Federal District Court for Washington D.C. similarly concluded that NEPA applies to critical habitat designations under the ESA. *See Cape Hatteras Preservation Alliance v. U.S. Department of Interior*, 344 F.Supp.2d 108 (November 1, 2004). These cases, and the analysis contained in them, indicate that NEPA does apply to critical habitat designations, and that such compliance serves an important function of informing the public, and assisting the agency in avoiding unintended environmental consequences.

In view of existing caselaw, uncertainties associated with the current proposal, and the need to avoid unintended environmental consequences when designating critical habitat, NMFS should comply with the requirements of NEPA before designating critical habitat for this species.

V. Summary and Conclusions

Similar to the views expressed by the U.S. Navy and accepted by NMFS, WSPA and its member companies have concluded that designation of critical habitat near refineries located in the vicinity of Cherry Point, March's Point, and the Blair Waterway, Washington, may adversely impact national security and military preparedness by delaying or curtailing petroleum supplies to the military. While the impacts of critical habitat designation are difficult to predict, even small impacts on refinery operations could result in significant direct and indirect impacts to the region by reducing petroleum supplies during periods of high demand. For these reasons, WSPA

[3] 48 F.3d 1495 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 698 (1996).

proposes to exclude certain areas from critical habitat that are adjacent to refinery facilities. Areas proposed for exclusion constitute a small percentage of proposed critical habitat, and their exclusion will not result in species extinction. Consequently, the benefits of the proposed exclusions outweigh the benefits of proposed designation; therefore, identified areas should be excluded from any final critical habitat designation pursuant to ESA Section 4(b)(2).

NMFS should delay designation of critical habitat for this species until the agency reevaluates its listing determination, defines the meaning of adverse modification in accordance with recent judicial opinions, and complies with NEPA. Completing these tasks prior to issuance of a final critical habitat designation will insure that any final agency action is based upon the best available data, and consistent with all legal requirements. Such a delay will not substantively affect killer whale conservation in view of existing ESA Section 7 consultation obligations for this species and listed salmonids occurring in Puget Sound.

Thank you for the opportunity to provide comments and recommendations on the proposed critical habitat designation. Please feel free to contact me at (360) 352-4506 if you have any questions regarding these comments or recommendations.

Sincerely,

Frank E Holmes

Frank E. Holmes, Northwest Manager
Western States Petroleum Association

Cc: Rear Admiral Richard R. Houck, Commander
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United States Coast Guard

Rear Admiral William D. French, Commander
Navy Region Northwest
United States Navy

Colonel Jerry P. Martinez, Commander
62nd Airlift Wing, McChord Air Force Base
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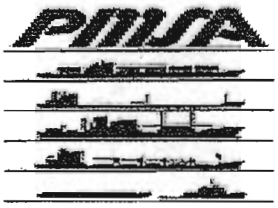

July 3, 2006

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Re: Proposed Recovery Planning Process for Southern Resident Killer Whales

Dear Ms. Darm:

The Pacific Merchant Shipping Association ("PMSA") and Western States Petroleum Association ("WSPA") (collectively, "the Associations") appreciate the opportunity to provide the National Marine Fisheries Service ("NMFS") with the following comments and information to assist NMFS in its development of a proposed recovery plan for Southern Resident killer whales (*Orcinus orca*). The Associations likewise submit these comments for NMFS' consideration in response to the Agency's proposed rule to designate critical habitat for the species. See 71 Fed. Reg. 34572 (June 15, 2006). The Associations represent commercial marine transport companies, container and oil terminals (and pipelines) in Puget Sound, Washington, and on the West Coast of the United States. Member companies operate marine vessels that transport a range of container cargo, crude oil, petroleum products, and other economically important materials to and from ports on the West Coast. Continued safe, secure, efficient, and environmentally- responsible operation of member vessels and facilities are issues of regional and national importance.

On October 3, 2005, NMFS published a notice requesting comments on a proposed conservation plan for Southern Resident killer whales prepared by NMFS under the Marine Mammal Protection Act ("MMPA") ("the Conservation Plan" or "the Plan"). See 70 Fed. Reg. 57565 (October 3, 2005). On November 18, 2005, NMFS listed the Southern Resident population unit as endangered under the Endangered Species Act ("ESA"). See 70 Fed. Reg. 69903 (November 18, 2005). Recent communications with the Agency indicate that NMFS intends to issue a proposed recovery plan for the species under Section 4(f) the ESA in the very near future based upon the Conservation Plan previously developed by the Agency under the MMPA. The Associations have reviewed the Conservation Plan prepared by NMFS under the MMPA, and offer the following comments to assist the Agency in its development of a draft ESA recovery plan for this species.

First, the Associations' support killer whale conservation and recognize that much scientific uncertainty exists regarding the factors relating to the health of killer whales in this region. We recognize that these scientific uncertainties create a significant challenge for NMFS. In view of the uncertainties associated with this species, we encourage NMFS to engage in as open a public process as possible to develop a scientifically-sound and fully informed recovery plan. The Associations intend to participate in these processes where and when appropriate to facilitate agency understanding of complex industry operations, regulations and performance to help insure agency actions are based upon the best available scientific and commercial information.

Second, the Conservation Plan and listing documents contain a reasonably thorough analysis of killer whale life history and other relevant background information. However, the Associations believe the Conservation Plan also omits key information and analysis. In particular, the Plan makes broad generalizations about potential risks to the species without a complete analysis of these risks. For example, the Plan portrays the risk of oil spills in Puget Sound as a significant risk to the species; however, the Plan does not adequately define or analyze the probability of Orca-threatening oil spill events in Puget Sound, nor does it consider the myriad of shipping and environmental laws, regulations, policies, and programs that have been successfully implemented and are continuously updated to address such risks. As a result, we believe the Plan does not accurately assess the risk of oil spill events, inviting the agency and other parties to invest limited resources in areas that are comprehensively and successfully addressed. We are committed to risk based, cost-effective risk mitigation and continuous improvement. This commitment requires a comprehensive understanding of the risk mitigation regimes in place now and how they are performing. We therefore recommend that NMFS revise the Plan as outlined below to incorporate a detailed analysis of existing regulatory mechanisms that address species' needs, and that NMFS avoid making sweeping (and unsupported) statements about risk without such an analysis.

The Conservation Plan also fails to adequately consider a number of key factors that may have caused the decline of the species, or that may interfere with species recovery. Regarding ambient noise and vessel traffic, the Plan appropriately avoids calling for regulatory restraints on non-whale watching vessels (e.g., marine container ships and oil tankers) given the absence of evidence linking such vessel traffic to whale impacts. However, with regard to food supply, the Plan makes no attempt to estimate the prey needed by a healthy killer whale population, and the proposed conservation measures would not significantly increase the availability of the killer whales' major prey, Chinook salmon, for several decades (Appendix A). A disconnect also exists between the Plan's identification of organochlorines (mainly PCBs and DDT) and other bioaccumulative toxins as a potential threat to the killer whales, and the Plan's generalized call for minimizing the discharge of all pollutants. Since specific types of contaminants are the focus of concern, the recommendations also should focus on those specific contaminants. The Plan should call for focused actions on these and other factors of decline, similar to the specific measures proposed for reducing whale watching impacts.

Aside from the Associations' concerns with the Plans' lack of detailed analysis, the Associations are also concerned with the process used by NMFS to develop the Conservation Plan. Given the cultural, legal, and economic significance of this listing, and the complexity

surrounding species recovery, the Associations recommend that NMFS establish a recovery team whose purpose would be to advise the Agency on recovery plan development. See 16 U.S.C. § 1533(f) (providing for formulation of recovery team). Such a process would result in the development of a more thorough and balanced recovery plan. The Associations recommend that NMFS delay issuing a proposed recovery plan until such time that a qualified recovery team is convened, and the team is provided an opportunity to review in detail and comment upon recommendations contained in NMFS' Conservation Plan.

I. Regulatory Measures and Processes that Prevent and Address Oil Spill Risks

A host of overlapping, sophisticated, and in some cases, redundant, regulatory programs exist that have dramatically reduced the occurrence and probability of oil spill events in Puget Sound. Such programs include spill international, federal, and state response planning, prevention, coordination, and enforcement actions. International and federal programs have undergone continuous refinement and revision in response to continuous evaluation of safety standards. These measures, coupled with industry-initiated measures identified below, have resulted in dramatic decreases in oil spill events from vessels nationwide. For example, from 1970's through the 1990's, there was a 94% reduction in average annual oil spill volumes from all vessel types (U.S Coast Guard Oil Spill Compendium - 2001).[1] From a regional perspective, Puget Sound has been a leader possessing the lowest commercial vessel oil spill rate in the nation for cargo vessels transiting in and out of our waters. There have been no documented drift grounding oil spill incidents in Puget Sound in over several million monitored vessel transits since the Vessel Traffic Service was implemented in the 1970's. This safety record is a result of many factors including years of regulatory and technological improvements, such as the required use of double hulled vessels, voluntary double hulling of fuel tanks on cargo ships, enhanced vessel traffic separation schemes and services, improvements in communications and global positioning systems, and implementation of a variety of oil spill prevention and compliance programs such as those discussed below.

Below we summarize relevant international, federal and state programs that have combined with non-regulatory efforts to effectively reduce oil spill-related risks in Puget Sound. This list is not exhaustive; rather, it is intended to illustrate the range of programs that currently exists to prevent and address oil spills in Puget Sound. Appendix B provides a partial listing and description of additional measures warranting NMFS' consideration. The Associations recommend that NMFS review in detail the full range of these and other applicable regulatory and non-regulatory programs prior to developing a recovery plan or other killer whale conservation recommendations.

A. International Maritime Organization

Due to the international nature of the shipping industry, it has long been recognized that actions to improve safety in maritime operations are more effective if carried out at an international level whenever possible rather than by individual countries acting unilaterally and without coordination. Although a number of important international agreements had already been

[1] See http://www.uscg.mil/hq/g-m/nmc/response/stats/aa.htm.

adopted, many countries believed that there was a need for a permanent body which would be able to coordinate and promote further measures on a more regular basis. It was against that background that a conference held by the United Nations in 1948 adopted a convention establishing the International Maritime Organization (IMO) as the first ever international body devoted exclusively to maritime matters (the original name was the Inter-Governmental Maritime Consultative Organization, or IMCO, but the name was changed in 1982 to IMO).

The International Maritime Organization is a permanent international body established under a 1958 International Convention to promote international maritime safety.[2] The IMO presently consists of 166 member states, including the U.S. Since its inception, the IMO has enacted a series of conventions and measures designed to prevent maritime accidents and to minimize their consequences. In order to achieve its objectives, IMO has, in the last 30 years, promoted the adoption of some 30 conventions and protocols and adopted well over 700 codes and recommendations concerning maritime safety, the prevention of pollution and related matters. These conventions and measures include the following:

International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties - This Convention, enacted in 1968, affirms the right of a coastal state to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate danger to its coastline or related interests from pollution by oil or the threat thereof, following upon a maritime casualty. Amendments to the Convention later extended it to cover substances other than oil.

International Convention for the Prevention of Pollution from Ships – This Convention, enacted in 1973, and modified by the Protocol of 1978, is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. It is a combination of two treaties adopted in 1973 and 1978 respectively and updated by amendments through the years. The Convention includes regulations aimed at preventing and minimizing pollution from ships - both accidental pollution and that from routine operations. The Convention covers not only accidental and operational oil pollution but also pollution by chemicals, goods in packaged form, sewage, garbage and air pollution.

International Convention on Oil Pollution Preparedness, Response and Cooperation – This Convention, enacted in 1990, is intended to establish a global framework for international cooperation in combating major incidents or threats of marine pollution. Parties to the Convention are required to establish measures for dealing with pollution incidents, either nationally or in co-operation with other countries. Ships are required to carry a shipboard oil pollution emergency plan per IMO standards (supplemented in the U.S. and other countries by additional requirements). Operators of offshore units under the jurisdiction of Parties are also required to have oil pollution emergency plans or similar arrangements which must be coordinated with national systems for responding promptly and effectively to oil pollution incidents. Ships are required to report incidents of pollution to coastal authorities and the convention details the actions that are then to be taken. The Convention calls for the establishment of stockpiles of oil spill combating equipment, the holding of oil spill combating exercises and the development of detailed plans for dealing with pollution incidents (again, the U.S. and other parties implement these and other requirements through federal regulations).

[2] See http://www.imo.org/home.asp for further information about the IMO.

Parties to the convention are required to provide assistance to others in the event of a pollution emergency and provision is made for the reimbursement of any assistance provided.

Protocol on Preparedness, Response and Co-operation to pollution Incidents by Hazardous and Noxious Substances - This Protocol, adopted in 2000, follows the principles of the International Convention on Oil Pollution Preparedness, Response and Cooperation Convention. Like the Convention, the Protocol aims to provide a global framework for international cooperation in combating major incidents or threats of marine pollution. Parties to the Protocol are required to establish measures for dealing with pollution incidents, either nationally or in cooperation with other countries. Ships are required to carry a shipboard pollution emergency plan to deal specifically with incidents involving hazardous and noxious substances.

B. Federal Oil Spill Prevention and Response Programs

The U.S. Coast Guard implements and oversees a number of regulatory programs to prevent and address oil spills, and is recognized as one of the world's premier maritime safety organizations. These regulatory and enforcement programs have dramatically reduced the volume of spills from commercial maritime activities (U.S. Coast Guard Oil Spill Compendium). Such programs are also designed to prepare for and respond to oil spills affecting U.S. waters. Below we briefly summarize some of the relevant aspects and requirements of these programs.

Oil Pollution Act. The Oil Pollution Act (OPA) of 1990, enacted in response to the Exxon Valdez incident, serves as the leading federal regulatory mechanism to prevent, respond to, and address damage caused by oil spills. OPA improved the nation's ability to prevent and respond to oil spills by establishing provisions that expand the federal government's ability, and provide the money and resources necessary, to respond to oil spills. OPA also created the national Oil Spill Liability Trust Fund, which provides up to one billion dollars per spill incident. OPA established new requirements for contingency planning both by government and industry. For example, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) has been expanded in a three-tiered approach: the Federal government is required to direct all public and private response efforts for certain types of spill events; Area Committees -- composed of federal, state, and local government officials -- have developed detailed, location-specific Area Contingency Plans; and owners or operators of certain vessels and facilities that are required and have prepared Response Plans tested by drill and exercise requirements. OPA increased penalties for regulatory noncompliance, broadened the response and enforcement authorities of the Federal government. OPA also requires all tank vessels greater than 5,000 gross tons operating in U.S. waters to be fitted with a double hull before January 1, 2015. Current law establishes a phase-out schedule under which all single-hull tank vessels built before 1979 have already been prohibited from operating in U.S. waters. All vessels that were constructed or that have undergone a major conversion after July 1, 1990 are required to be fitted with a double hull at delivery. The Act's double hull requirements and phase-out schedule were generally accepted by the international community through the International Maritime Organization (IMO) discussed above. Note: new container vessels are voluntarily double hulling fuel tanks to provide similar protections.

Spill Prevention, Control and Countermeasure (SPCC) Plans - In July 2002, the U.S. Environmental Protection Agency (EPA) amended the OPA regulations to incorporate revisions proposed in 1991, 1993, and 1997. Subparts A through C of the Oil Pollution Prevention regulations are referred to as the "SPCC rule" because they describe the requirements for certain facilities to prepare, amend and implement Spill Prevention, Control and Countermeasure (SPCC) Plans. SPCC Plans are a cornerstone of EPA's strategy to prevent oil spills from reaching our nation's waters. Unlike oil spill contingency plans that typically address spill cleanup measures after a spill has occurred, SPCC Plans ensure that facilities put in place containment and other countermeasures that would prevent oil spills that could reach navigable waters. Under EPA's Oil Pollution Prevention regulation, facilities must detail and implement spill prevention and control measures in their SPCC Plans. A spill contingency plan is required as part of the SPCC Plan if a facility is unable to provide secondary containment (e.g., berms surrounding the oil storage tank). Each SPCC Plan, while unique to the facility it covers, must include certain elements. To ensure that facilities comply with the spill prevention regulations, EPA periodically conducts on-site facility inspections. Facilities are now required to submit certain information after having two or more discharges (over 42 gallons) in any 12-month period or a single discharge of more than 1,000 gallons.

Facility Response Plans (FRP) – The Clean Water Act (CWA) as amended by OPA, requires that certain facilities that store and use oil must prepare and submit plans to respond to a worst case discharge of oil and to a substantial threat of such a discharge. EPA has established regulations that define who must prepare and submit an FRP and what must be included in the plan. An FRP is a plan for responding, to the maximum extent practicable, to a worst case discharge of oil and to a substantial threat of such a discharge. The Plan also includes responding to small and medium discharges as appropriate. According to OPA, an owner or operator of a "substantial harm" facility must develop and implement an FRP. A "substantial harm" facility is a facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on navigable waters or adjoining shorelines.

Prevention and Enforcement Programs - The U.S. Coast Guard serves as the principle prevention and enforcement authority in marine areas under OPA and related federal laws and regulations including the enforcement of international standards to which the U.S. is signatory. Extensive regulations cover vessel design, construction, equipment, crew competency and operational procedures as well as vessel traffic, anchoring and port specific requirements including such things as safety zones and regulated navigation areas. All reports of hazardous substance releases and oil spills made to the federal government are processed by the National Response Center (NRC). The NRC records and maintains all reports in a computer database called the Emergency Response Notification System, which is available to the public. The NRC relays release information to the U.S. Coast Guard or U.S. EPA Agency On Scene Coordinator (OSC), depending on the location of the incident. In every area of the country, OSCs are on-call and ready to respond to an oil or hazardous substance release at any time of the day. After receiving a report of an oil or hazardous substance release, the federal OSC evaluates the situation and, if the OSC decides that a federal emergency response action is necessary, the National Response System is activated. Alternatively, the OSC will ensure the clean up activities of the responsible party are timely and appropriate or will issue orders or federalize the

response. State and local governments have developed and coordinated additional response procedures.

C. Multi-Jurisdictional Oil Spill Prevention and Response Programs

Supplementing international and federal programs are inter-governmental programs that serve to facilitate coordination between the U.S. and Canada, as well as federal and state jurisdictions. Such programs include the following:

Port State Control – inbound vessels are screened to eliminate substandard vessels. A vessel can be denied entry, be required to implement special operational conditions, targeted for inspection underway, at anchor or at the dock or allowed to proceed. Screening is a risk-based process based designed to target and eliminate substandard operations and ensure compliance with international and federal requirements. Coast Guard District Thirteen covering Washington and Oregon ports has the lowest substandard vessel detention rate of all Coast Guard districts (Coast Guard Annual Port State Control Reports).

Joint U.S./Canada Response Team - In the mid-1980s, Canada and the United States began efforts to reach an agreement to protect and improve their border environment. Both countries recognized that taking steps to prevent chemical accidents along the border helps keep the population and environment safe. These efforts resulted in the development of joint contingency plans.

National Preparedness for Response Exercise Program – The U.S. Coast Guard, the U.S. Environmental Protection Agency, the Research and Special Programs Administration in the U.S. Department of Transportation, and the Minerals Management Service developed the National Preparedness for Response Exercise Program (PREP) to provide guidelines for compliance with OPA pollution response exercise requirements. Consisting of periodic unannounced emergency drills as required by OPA, the PREP guidelines also recommend announced drills. The guiding principles for PREP establish both internal exercises, which are conducted within a plan holder's organization, and external exercises, which extend beyond a plan holder's organization to involve other members of the response community. These exercises are designed to evaluate the entire response mechanism in a given Area to ensure adequate pollution response preparedness. The goal of PREP is to conduct approximately 20 Area exercises per year, with the intent of exercising most Areas of the country over a three-year period. These exercises help insure timely and effective response to oil spill events.

Northwest Area Committee and associated Work Groups - The stated mission of the Northwest Area Committee (NWAC) is to protect public health and safety and the environment by ensuring coordinated, efficient, and effective support of the federal, state, tribal, local, and international responses to significant oil and hazardous substance incidents within the Pacific Northwest Region as mandated by the National Contingency Plan. The NWAC has developed and implemented the NWAC plan and meets regularly to review and improve it through a coordinated effort.

D. State Oil Spill Prevention and Response Programs

The state of Washington, through the Washington Department of Ecology, plays a role in monitoring and implementing oil spill prevention and response programs in Puget Sound. These state programs serve to augment international and federal standards enforced by the U.S. Coast Guard.[3] Examples include the following:

Strengthening the State/Coast Guard Partnership - On May 25, 2001, former Governor Gary Locke and 13th U.S. Coast Guard District Commander Admiral Erroll Brown signed a memorandum of agreement on oil spills. This agreement was designed to strengthen federal and state collaborative efforts to prevent and respond to oil spills in Washington's waters. Implementing protocols cover oil spill response, oil transfer monitoring and information sharing among other activities. Other joint initiatives include implementing recommendations from the North Puget Sound Oil Spill Risk Management Panel, managing the risk of oil spills in Haro Strait and on the Columbia River, and working with the Pacific States/British Columbia Oil Spill Task Force.

Vessels and Oil Handling Facilities - There are 35 oil handling facilities and major transmission pipelines in Washington under state regulation. Ecology staff review and approve the facilities' oil spill prevention plans, operation manuals, and certifies personnel training programs to ensure that tanks and pipelines are designed and operated in a manner that will minimize the risk of oil spills. In addition, commercial vessels of a certain size are required to have an oil spill response contingency plans. In June 2006, Ecology proposed new oil transfer standards and oil spill contingency plan rules to incorporate and augment federal standards.

II. Industry-Initiated Safety Practices

Aside from the various regulatory processes outlined above, the marine shipping industry has initiated a number of planning processes to proactively address environmental issues relating to marine shipping. Within Puget Sound, the Associations have been leaders in developing a Harbor Safety Plan to capture and implement best management practices. The Associations have also worked with stakeholders to develop consistency on mitigating ballast water risk. Member companies have supported environmentally-friendly vessel construction programs, developed enhanced crew competency standards, and have implemented safety management and environmental compliance systems on marine vessels. Specific examples of industry-initiated practices include the following:

International Tug of Opportunity System - The "International Tug of Opportunity System" organizes powerful tugboats on both sides of the U.S./Canada International Boundary into a response system for the use of the appropriate coast guard. Through mutual agreements of the industry sectors on both sides of the border, more than 100 tugs were outfitted with electronic

[3] Specific Washington laws implemented by Ecology include Chapter 90.56 RCW, Oil and Hazardous Substance Spill Prevention and Response; Chapter 88.46 RCW, Vessel Oil Spill Prevention and Response; Chapter 90.48 RCW, Water Pollution Control; Chapter 88.40, Transport of Petroleum Products - Financial Responsibility; Chapter 70.105 RCW, Hazardous Waste Management Act; Chapter 70.105D RCW, Model Toxics Control Act.

transmitters that made them visible whether they were in or out of radar coverage. This information is provided to the coast guard vessel traffic systems and is used to assist in rapid identification of response resources in the event of an emergency. Recently, new transponder technology (AIS) has expanded this capability to include more tugs over a broader area.

Best Practices. Over the past ten years, Association members have voluntarily engaged in capturing best practices and standards of care implemented via company policies and/or the Harbor Safety Plan. These efforts are made to augment regulatory regimes and provide port specific guidance.

III. Available Technical Information – Risk Assessments and Prevention Studies

A number of recent assessments and studies have been conducted in Puget Sound to evaluate marine vessel traffic and related marine safety issues. Such studies include the International Tug of Opportunity Study,[4] the Study of Tug Escorts in Puget Sound,[5] the Port Access Route Study,[6] and the Port and Waterway Safety Assessment for Haro Strait and Boundary Pass.[7] These and other recent studies review in detail vessel operation and safety protocols, and make recommendations to reduce the risk of accidents and environmental damage. Implementation of study recommendations over the past ten years through various regulatory programs has further reduced the risk of catastrophic accidents in Puget Sound.

The Associations believe that recent risk assessments and prevention studies conducted in Puget Sound illustrate how the risk of oil spill events have been thoroughly and continuously evaluated and are being comprehensively addressed. Marine vessel operations in Puget Sound are highly regulated, and closely scrutinized. NMFS should closely evaluate these and other relevant studies prior to developing recovery plan recommendations that may result in duplication of these efforts. Doing so will help ensure the Agency accurately characterizes the risks associated with marine vessel operations, and avoids focusing limited resources on highly regulated industrial sectors that have minimized and mitigated their impacts to the maximum extent practicable. Such measures are continuously updated and reviewed to incorporate lessons learned, new technology and the best available information.

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[4] Available at http://www.uscg.mil/hq/g-m/nmc/response/itos_all.pdf

[5] Available at http://www.ecy.wa.gov/programs/spills/hottopics/tug/tugstudystuff/FinalReport.pdf

[6] Available at http://www.uscg.mil/D13/oan/pars/sjdf.htm

[7] Available at http://www.navcen.uscg.gov/mwv/projects/pawsa/WorkshopReports/Haro%20Strait.pdf

IV. Sound and Noise Disturbance Attributed to Marine Vessels

The Conservation Plan suggests that vessel noise may be detrimental to killer whale survival by impairing foraging and other behavior patterns. See Conservation Plan at 83. NMFS recommends that the presence and activity patterns of non-whale-watching vessels in the vicinity of Southern Resident and other killer whales should be evaluated to determine their potential effect. NMFS also suggests the need to establish regulations regarding vessel activity in the vicinity of killer whales should be evaluated.

As the Conservation Plan indicates, the impacts of vessel noise on killer whales, particularly noise associated with large cargo vessels, is poorly understood, and threshold levels at which underwater sounds become harmful are unknown. In 2003 the National Research Council ("NRC") concluded that no documented evidence exists of ocean noise being the direct physiological agent of marine mammal death under any circumstances.[8] The long-term effects of ambient noise on marine organisms are even less well understood.

The Associations agree with the Conservation Plan and the NRC that no evidence currently exists to suggest that cargo vessel noise is causing direct injury or mortality to killer whales. In view of the considerable uncertainties associated with the effects of vessel noise on marine mammals, it is premature to conclude a need exists for regulatory programs to address this issue. Through the pending recovery plan process, NMFS should clarify the current state of scientific research, and it should avoid suggesting the need for additional regulatory requirements concerning vessel noise until such time that available scientific information demonstrates a causal link between noise and harm to the listed species.

V. Legal Considerations Relevant to Marine Transportation

Cargo and tanker vessel movements are highly regulated by numerous federal laws and international treaties. Vessel movements and shipping lane operations in general implicate important national security considerations and international agreements. NMFS' legal authority to regulate in this complex legal environment is at best unclear. The Associations believe that any proposed recovery plan should carefully evaluate these issues through discussions with the State Department, the Defense Department, the Department of Homeland Security and the shipping industry to ensure that any recovery plan recommendations reflect a realistic assessment of actions that can in fact be implemented.

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[8] National Research Council, *Ocean Noise and Marine Mammals*, Committee on Potential Impacts of Ambient Noise in the Ocean on Marine Mammals (2003).

VI. Procedural Avenues for Further Discussion

As discussed above, the Associations encourage NMFS to engage with the Associations and other stakeholders over the Agency's development of a proposed recovery plan for Southern Resident killer whales. Operation and regulation of marine vessels in Puget Sound is a complex arena, and many existing programs, laws, regulations, and policies likely address the needs of the listed species and the Agency. The Associations suggest that NMFS formulate a recovery team consisting of experts from the military, industry, state and federal government, and other sectors to assist the Agency in its development of a recovery plan.[9] Doing so will help ensure that any recovery plan reflects thoughtful consideration of those risks that are reasonably foreseeable in view of existing regulatory and non-regulatory marine safety and facility operation regimes.

Thank you for the opportunity to provide preliminary comments and recommendations concerning the development of a draft killer whale recovery plan. Please feel free to contact Frank Holmes, WSPA at (360) 352-4506, or Mike Moore, PMSA at (206) 441-9700 if you have any questions regarding these comments or recommendations.

Sincerely,

Frank E. Holmes, Northwest Manager
Western States Petroleum Association

Michael R. Moore, Vice President
Pacific Merchant Shipping Association

Enclosures

[9] The Associations believe that a recovery team should consist of knowledgeable experts from the United States and Canadian environmental agencies, the military, industry, academia, and environmental groups. Similar to NMFS' salmon recovery planning efforts, the Agency could establish both technical and policy advisory groups to ensure the range of relevant issues are considered during recovery plan development.

Cc: Rear Admiral Richard R. Houck, Commander
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Navy Region Northwest
United States Navy

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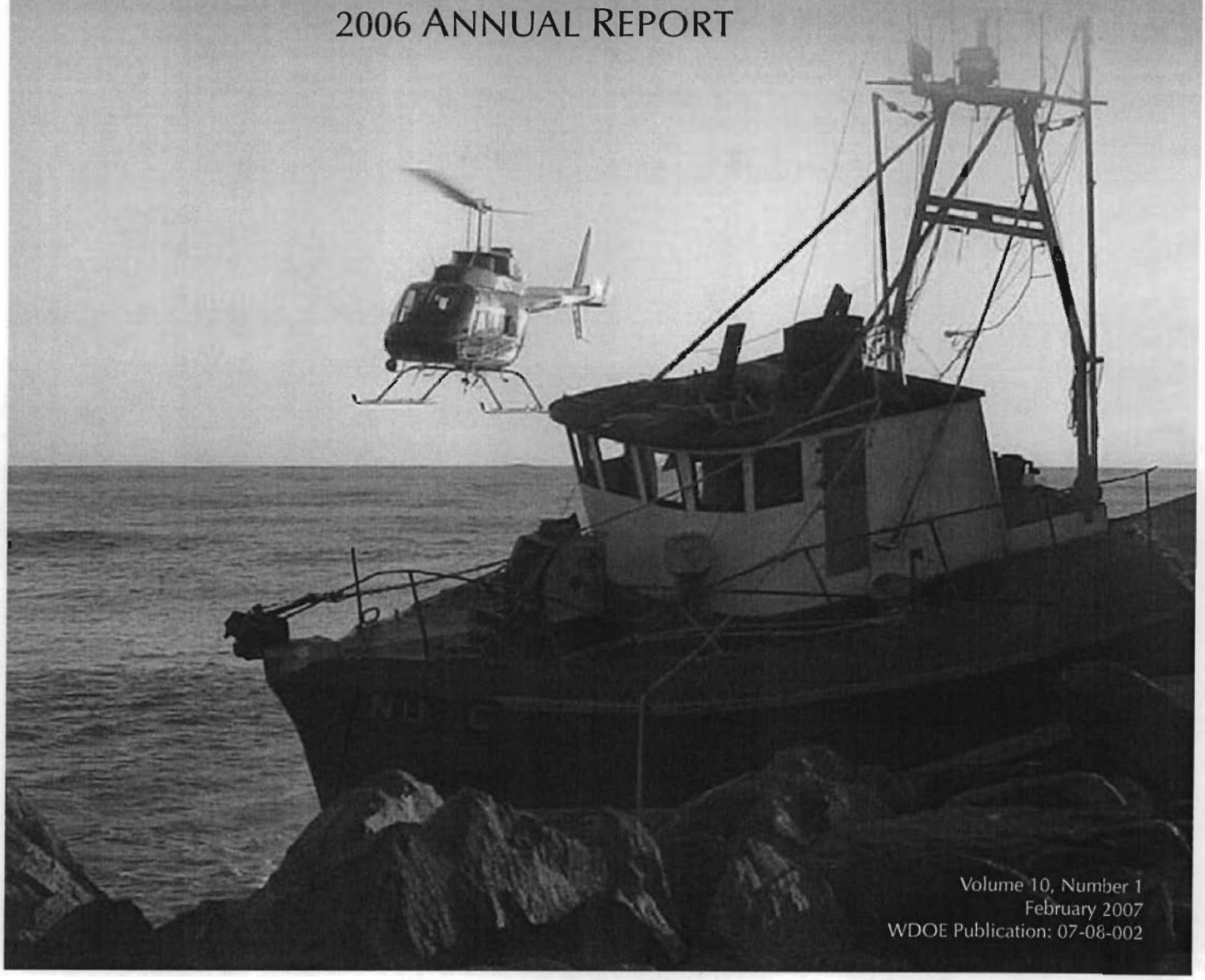
Spill Scene

Spill Prevention, Preparedness, and Response Program

WASHINGTON STATE DEPARTMENT OF ECOLOGY

Spill Prevention, Preparedness, and Response Program

2006 ANNUAL REPORT



Volume 10, Number 1
February 2007
WDOE Publication: 07-08-002

Spill Scene

Spill Scene is published by the Washington State Department of Ecology to provide information on oil and hazardous material spill prevention, preparedness and response. We welcome your comments and questions. Call (360) 407-7455 or write:

Spill Scene
Washington State Department of Ecology
Spills Program, P.O. Box 47600
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Other photos: Department of Ecology, unless otherwise noted

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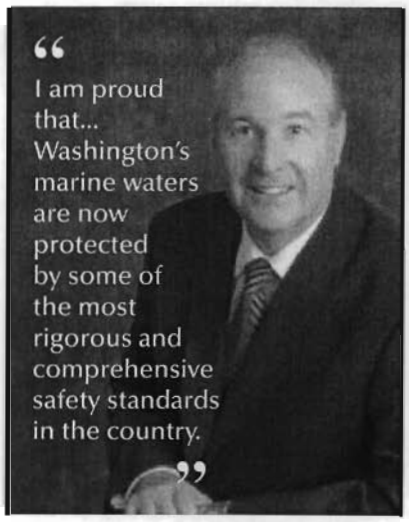


I am pleased to present this year's Spill Scene annual report in a new format. Although the Washington Department of Ecology's mission has not changed, I believe our accomplishments, future goals and opportunities for continued improvement deserve to be laid out more vividly for the Legislature and our many partners in the public and private sectors. This annual report clearly expresses where we were and what we did in 2006, and also charts our course for 2007.

I am proud that 2006 was a landmark year for Ecology's Spills Program. Our actions to protect the environment spoke loudly, including our push to deploy more inspectors to the field to help implement our more universal and stringent oil transfer rules, and increase vessel inspections and unannounced vessel notification drills. We deployed emergency spill response equipment to 46 sites across the state, many in remote locations, thus significantly reducing spill response times and vastly improving our ability to control spills in those crucial first moments. And, we cleaned up thousands of chemical, oil and hazardous waste spills, and hundreds of illegal methamphetamine labs and dumpsites throughout the state.

As a result, Washington's marine waters are now protected by some of the most rigorous and comprehensive safety standards in the country. These successes and future progress will help protect Puget Sound for years to come.

But what I hope resonates most strongly are the 'quiet' incidents you didn't hear about – in other words, the threats that never developed. In the last week of 2006 alone, Ecology, the U.S. Coast Guard and our contractors monitored or responded to three separate disabled, drifting vessels (one carrying nearly 1.5 million gallons of heavy fuel oil) on the outer coast without casualty, incident or a drop of oil spilled. Though such extremes are rare, I am proud that the Spills Program prevention efforts and widespread compliance from industry result in similar payoffs everyday. For example, since the Spills Program was established in 1991, we have seen a notable decrease in large oil spills, as well as the overall volume of these spills (see Figure 1).

While the lines separating the achievements of our spill prevention, preparedness and response efforts are often blurred, the central target to achieve "Zero-Spills" through prevention is fixed in all of our sights. However, whenever and wherever a major oil spill or hazardous material release occurs, our Spills Program stands ready to mount a rapid, aggressive response.

I look forward to continuing progress in preventing oil and hazardous material spills in Washington by engaging our partners to implement new initiatives in 2007.

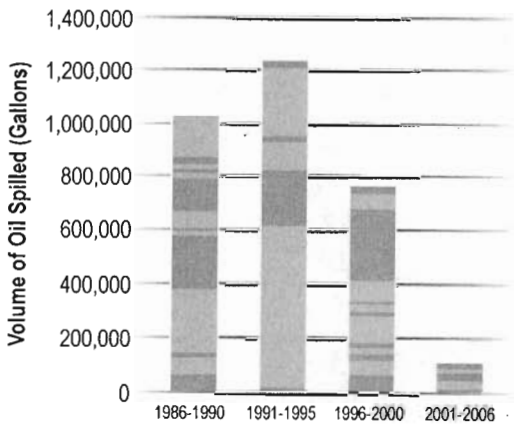


FIGURE 1
Each colored band indicates a distinct spill over 10,000 gallons in a 5-year period since 1986.

Dale Jensen
Program Manager

2006 Headlines

Ecology expanded its effective partnerships with state and federal agencies, local communities, regulated industries (such as oil refineries, the maritime industry, trucking companies and marine terminals) and tribes to prevent and rapidly respond to oil and hazardous material spills. Ecology consulted with the Oil Spill Advisory Council, Northwest Area Committee, Pacific States/British Columbia Oil Spill Task Force and the State Emergency Response Commission. Notable 2006 accomplishments include:

- Hired and deployed six new inspectors who began implementing the new Oil Transfer Rules with the goal of preventing spills and reducing environmental impacts.
- Mounted 1,186 field responses to contain and clean up oil and hazardous material spills that posed a risk to public health and the environment.
- Ecology's staff of licensed, professional mariners conducted 1,587 vessel inspections to fight complacency and promote compliance.
- Adopted and began implementing new Oil Spill Contingency Planning rules to ensure industry is ready to respond to oil spill risks.
- Contained approximately 60,000 gallons and removed 31,000 gallons of weathered oil in the derelict ship *S.S. Catala* to protect commercial shellfish beds, shorebird habitats and recreational interests.
- Penalized and collected a $540,000 fine from ConocoPhillips for the 2004 Dalco Passage oil spill.
- Began delivering oil spill response equipment to local first responders in 46 locations across the state.
- Entered into a long-term contract with the world's largest response and cleanup contractor, Marine Spill Response Corporation.
- Contracted Crowley Maritime to operate the Neah Bay rescue tug, the coast's only oil spill prevention asset.
- Supported local government and protected public health by removing and disposing hazardous material from 390 illegal drug labs.

Spills Program Budget

Ecology's Spill Prevention, Preparedness and Response Program employs 73 full-time staff, including regular and after-hours responders, with a dedicated budget of $14.3 million per year, a large portion of which is reserved for non-operating costs. These activities include:

Operating Costs

- Spill Prevention - $2,297,969
- Spill Preparedness - $1,382,336
- Spill Response - $4,352,685
- Natural Resource Damage Assessment - $203,798

All staff positions and operational costs total $8,236,788 per year (see Figure 2).

Non-Operating Costs

- Neah Bay Rescue Tug - $1,438,000
- Enhancement and Restoration Projects - $888,000
- Oil Spill Response Account - $3,528,776 (strictly reserved for emergency response to major spills)
- Spill Response Equipment Grants - $1,450,000 (one-time appropriation, not included in dedicated budget)

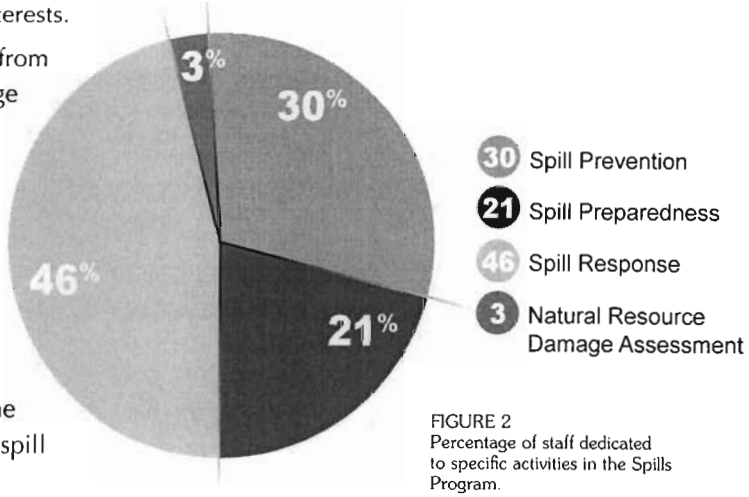


FIGURE 2
Percentage of staff dedicated to specific activities in the Spills Program.

Spill Prevention Activities

In addition to costing Washington taxpayers millions of dollars in response and cleanup, oil spills can cause long-term and potentially irreversible damage to the state's unique ecosystems and local quality of life. The state's aquatic habitats and shorelines provide bountiful recreation, tourism and commercial opportunities to the public. Therefore, it is vital to protect our environment from the destructive effects of oil spills. Ecology's focus on prevention, in partnership with the Coast Guard, regulated industries, environmental groups, tribes and other stakeholders, represents the state's first line of defense against such damage. Here is what Ecology accomplished in 2006:

Category	Coverage	Number	Requirements
Class I	Major Refineries and Large Facilities	30	Operation Manuals, Prevention Plans, Training & Certification Program
Class II	Fuel Trucks	30	Operation Manuals, Training & Certification Program
Class III	Small Terminals that Fuel Vessels	7	Operational Transfer Procedures
Class IV	Marinas with Fuel Docks	72	Spill Reporting, Preventative Maintenance

TABLE 1
Oil transfer facility classes and requirements as designated by the new oil transfer rules.

New Oil Transfer Program Established

In the wake of a 4,700-gallon oil spill at Point Wells in 2003, state lawmakers directed Ecology to set new standards to help prevent oil spills. The new rules were adopted on September 26, 2006, and have expanded the number of commercial operations regulated by the program. Previously, Ecology only regulated major maritime shipping operations and large facilities such as oil refineries. The new spill prevention rules provide more universal coverage relating to oil that is transferred in bulk over state waters.

Under the new transfer rules, Ecology recognizes four classes of regulated oil facilities (see Table 1). Each type has planning and operational requirements specific to their operations. All facilities must now meet new equipment, reporting, preventative maintenance and operational requirements (see Figure 3). Vessels continue to be regulated under the agency's ship fueling regulations, and indirectly through specific requirements established by each facility.

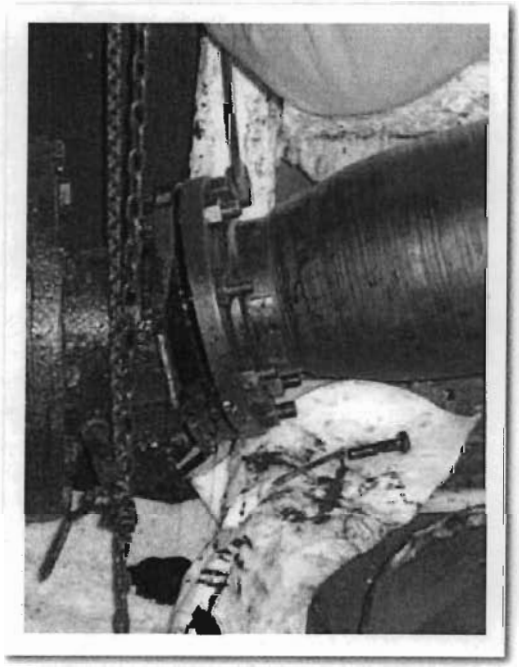


FIGURE 3
The new oil transfer rules seek to reduce oil spills from fueling facilities, like this leaking bunker connection.

To help implement the new rules, Ecology added six new inspectors to oversee oil transfers throughout the state, particularly the Columbia-Snake river system, the Strait of Juan de Fuca and Puget Sound. This is a critical strategy to prevent oil spills from this class of operations and make progress toward "Zero-Spills."

Refinery and Pipeline Inspections

In addition to the new oil transfer inspections, Ecology continued to focus on oil spill prevention at refineries and pipelines. Spill prevention engineers conducted facility inspections and developed guidelines on facility operation manuals and training programs to help facilities meet state requirements. Ecology conducted more intensive oil pipeline inspections due to the severity of recent pipeline spills.

Vessel Inspections

Inspectors board vessels to check vessel compliance with state spill prevention regulations and to provide technical assistance (see Figure 4). They also conduct investigations to determine causes of incidents and how to best target future efforts, ultimately increasing the level of environmental protection and maritime safety in the state.

In 2006, Ecology personnel conducted 1,587 vessel inspections, including 597 fueling inspections, 515 oil spill notification drills and 461 cargo and passenger vessel substantial risk inspections. As the number of inspections climbed in the last 10 years, the vessel incident rate, or the rate at which vessels have a spill, near-miss or collision, dropped (see Figure 5).

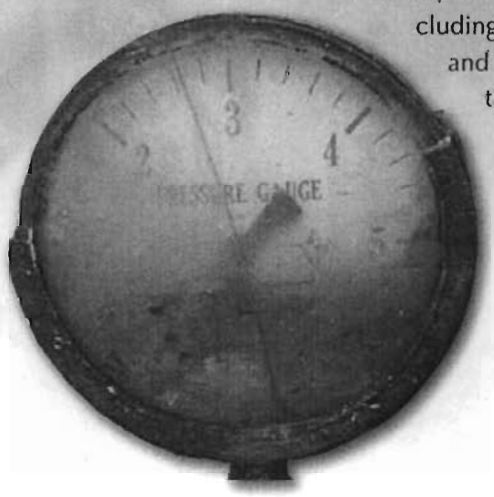


FIGURE 4
Vessel inspections routinely discover broken or non-operational equipment, like this corroded pressure gauge found on a 2006 inspection.

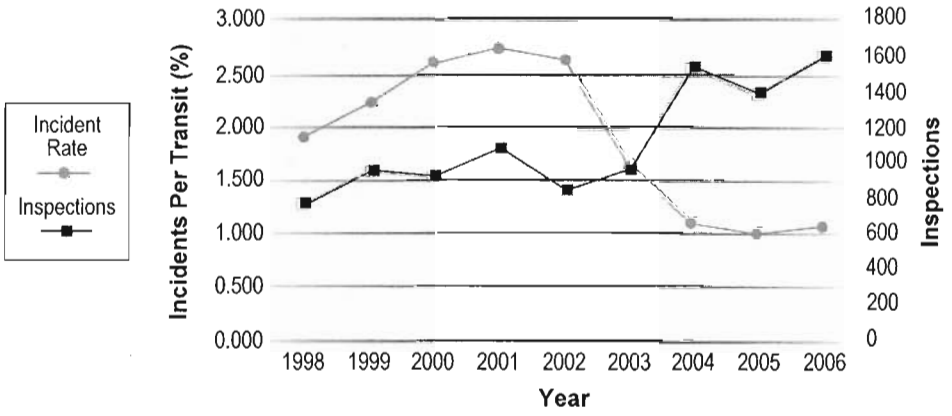


FIGURE 5
Vessel incident rate and vessel inspections from 1998-2006. Some of the recent drop in oil spill incidents can be attributed to a rise in the frequency and quality of inspections.

Neah Bay Rescue Tug

Vessels that become disabled, such as steering or power loss, are low probability occurrences that can have serious consequences for the environment, coastal economies and crew/passenger safety. To help manage this risk, a government-funded rescue tug has been stationed at Neah Bay, located at the northwest tip of Washington, on a seasonal basis since early 1999 (see Figure 6). State lawmakers appropriated $1.4 million from the Vessel Response Account to fund the tug in 2006. The tug helps reduce the risk of major maritime accidents and oil spills by providing emergency towing and initial salvage services.

The tug operates in areas characterized by:

- High vessel traffic.
- Hazardous weather conditions.
- No escort requirements.
- Numerous threatened and endangered fish, birds and mammals.
- Culturally unique tribal reservations and resources.

A Foss Maritime tug was deployed to Neah Bay from January through April, and November through December 2006, under Ecology's existing contract at $6,000 per day plus fuel.

FIGURE 6
Foss Maritime's *Lauren Foss* on patrol near Neah Bay in early 2006.

In November 2006, after a competitive procurement process, Ecology awarded the 2007 rescue tug contract to Crowley Maritime, at the cost of $8,500 per day plus fuel. The contracted service began on January 1, 2007, and will run until the approximately $1 million remaining in legislative funding is spent. The contract contains an option that allows future extensions.

> "Prevention is the key when it comes to protecting Puget Sound from oil spills. The Department of Ecology has been instrumental in stationing a rescue tugboat at the entrance to the Strait of Juan de Fuca – a crucial prevention measure."
>
> – Kathy Fletcher
> *Executive Director, People for Puget Sound*

Voluntary Vessel Prevention Programs

Ecology manages two voluntary, non-regulatory oil spill prevention programs for oil tanker and oil tank barge operators. Companies are invited to participate in Ecology's Exceptional Compliance Program (ECOPRO) or "Voluntary Best Achievable Protection" (VBAP) Program. Under these programs, companies are acknowledged for adhering to stricter marine safety standards to reduce the likelihood of an oil spill.

Vessel Incident Rate

The vessel incident rate is calculated as the percentage of trips in which large commercial vessels experience significant problems (such as an oil spill or a loss of propulsion or steering) out of the total number of transits in state waters. The incident rate reflects the overall safety of the maritime industry.

The incident rate has hovered around 1 percent for the past three years (see Figure 7). As Ecology works with its partners to meet the legislative goal of "Zero-

Spills," it is worth noting how few spills from large commercial ships occur each year in Washington. Ecology documented only 30 spills during 2006. The relatively low vessel incident rate of the late 1990s (before the peak in 2001) is probably due to a previous lack of emphasis on detecting and reporting spills. The vessel incident rates reported from 2000 through 2002 are probably a closer indication of the true recent baseline. As industry compliance and state and federal oversight have improved, the incident rate has declined. However, the state remains at risk from these rare, but high-impact events.

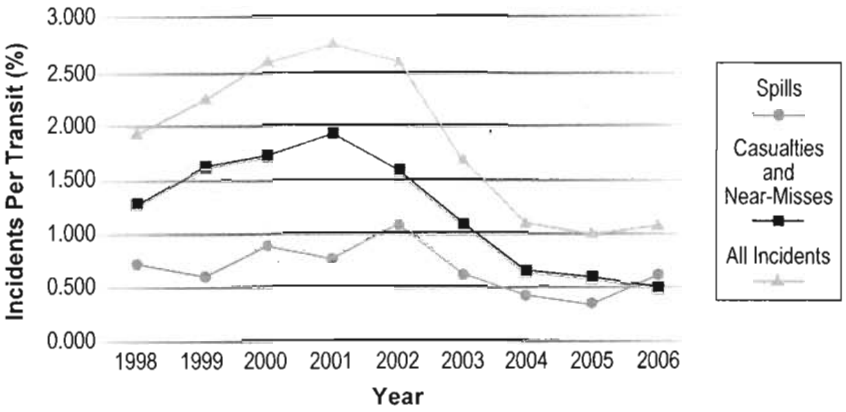


FIGURE 7
Vessel incident rate from 1998-2006 for all Washington waters. Improved compliance by large vessels passing through our waters has led to a statewide drop in oil spills and near-misses.

Education and Outreach

Ecology developed and distributed more than 45 separate fact sheets and oil spill prevention bulletins for non-regulated businesses and the general public. These publications highlight best operating practices and strategies to prevent or reduce oil spills, and describe oil spill incidents and lessons learned.

Ecology collaborated with several external organizations including the Pacific States-British Columbia Oil Spill Task Force and the Pacific Oil Spill Prevention Education Team (POSPET). These groups include representatives from British Columbia, Washington, Oregon, California, Alaska and Hawaii. POSPET focuses on preventing small oil spills by pooling talent, resources and messages between partners along the West Coast (see Figure 8).

Ecology also coordinated with the Coast Guard Auxiliary and University of Washington's Sea Grant Program to educate small fishing vessel operators, boat owners and marina operators about best management practices and oil spill prevention techniques.

FIGURE 8
The "Spills Aren't Slick" education campaign is directed at small boat owners and marina operators, and promotes immediate spill reporting and spill prevention techniques.

Legal Brief Filed to Protect State Authority

A significant judicial case concerning boundaries of state-federal regulatory authority arose from the Massachusetts Oil Spill Prevention Act of 2004. The case is referred to as *United States et al v. Commonwealth of Massachusetts*. The plaintiffs, the United States and several shipping companies, challenged the state provisions that they believed were preempted by the federal Ports and Waterways Safety Act. Specific issues include obligating vessels to have a state-licensed pilot while plying state waters, compulsory tug boat escorts in certain waters, establishment of designated vessel routes, and allowing vessel operators to institute additional safety measures in lieu of a portion of their required $1 billion certificate of financial assurance.

The federal government challenged Massachusetts' legislation and a federal district court ruled against the state in July 2006, arguing that existing federal laws preempt state law based on the Supremacy Clause of the U.S. Constitution. After reviewing the decision, Ecology and the Washington State Attorney General's Office became concerned that the federal lower court decision may not have been made upon proper grounds. State Attorney General Rob McKenna, with concurrence of Governor Chris Gregoire, filed an "amicus curie" (friend of the court) legal brief in the U.S. First Circuit Court of Appeals. Washington was joined by Maine, Rhode Island, Alaska, Oregon, California and Puerto Rico. The purpose of the brief is to assert states' rights to have strong and legally defensible spills programs.

Spill Preparedness Activities

For the last several years, Ecology has encouraged a proactive, participatory approach to managing large oil spills and promoted a culture of initiative rather than reaction or complacency to potential spills. Effective spill management prevents or minimizes environmental and economic damage. Here is what Ecology accomplished in 2006:

New Oil Spill Contingency Plan Rules for Industry

Ecology adopted and began implementing new contingency plan rules in October. These rules require industry to have spill management teams and contractors on retainer to rapidly and aggressively respond to spills. They also ensure response equipment is staged at highly trafficked and sensitive areas in Puget Sound, the outer coast, the San Juan Islands and the Columbia River.

Specifics of the new rules include:

- New shoreline cleanup and aerial surveillance planning standards.
- New equipment staging standards for pipeline companies.
- Criteria for evaluating frequency and scope of drills.
- Consistency with pending federal rules for non-tank vessels.

In Washington there are 42 contingency plans for industry. These plans cover major maritime shipping operations, oil handling facilities, refineries and pipelines. Each company is required to develop, maintain and practice their contingency plan. All plans are reviewed and approved by Ecology on a five-year cycle.

Updated the Northwest Area Contingency Plan

The Northwest Area Contingency Plan, incorporating Washington, Oregon, Idaho, EPA and the Coast Guard, is an important agreement that directs oil spill and hazardous material response for the multi-state area. In July three major changes were made to the Area Plan:

- Designated three types of oil dispersant chemical use areas and revised the authorization checklist.
- Improved the way that communities and the media will receive information during oil spills and hazardous material incidents by developing a Joint Information Center Manual.
- Developed a policy governing how a place or port of refuge is determined when large, commercial ships are in distress.

> “Personnel safety and oil spill prevention are my top priorities; and I am proud of the progress we are making with our state and federal partners.”
>
> – Anil Mathur
> *President,*
> *Alaska Tanker Company*

Geographic Response Plans

Geographic Response Plans are site-specific spill response strategies that are tailored to a specific beach, shore or waterway. These strategies guide decision-making in the first several hours following a spill and minimize impacts on sensitive areas. Each response plan has two priorities:

- Identify sensitive natural, cultural or significant economic resources.
- Describe and prioritize response strategies.

Currently, all coastal and some selected inland water areas in Washington and Oregon are covered by 34 distinct but integrated response plans. In 2006, Ecology and its partners improved the response plans by acting on recommendations from advisory committees and public feedback, aggressive testing and updating, and capturing lessons learned.

All marine response plans will be revised and the remaining inland plans are expected to be fully developed over the next five years.

Oil Spill Readiness Drills

Drills afford the state an opportunity to work with oil spill contingency plan holders to ensure that spills will be appropriately managed and response contractors are able to fulfill their commitments. Drills document the level of readiness of regulated companies, help identify the need for additional investments in training and equipment and promote collaboration between industry and state response teams (see Figure 9).

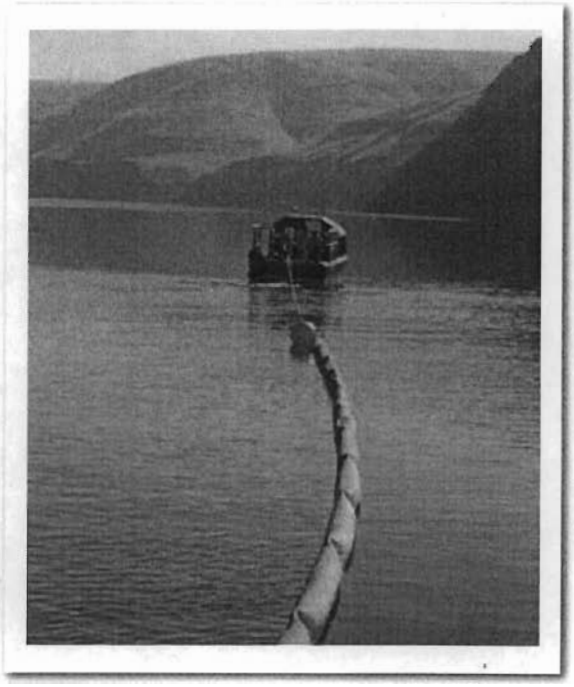


FIGURE 9
Drills, like this booming exercise conducted on the Columbia River, are important learning tools for improving spill response.

Regulated companies must conduct three major drills annually that are evaluated by Ecology. Of the drills, two must be equipment deployment exercises and one must involve a table-top or role-playing scenario. Every three years, one of the table-top exercises must be a worst-case scenario (see Table 2).

Unannounced Oil Spill Readiness Drills

Ecology periodically conducts unannounced drills designed to assess the readiness of regulated companies. These drills are designed and conducted in partnership with the Coast Guard and EPA. On December 8, 2005, Chevron became the first oil shipping company to refuse a request by Ecology to participate in an unannounced drill. The drill was designed to test the company's readiness if one of their tankers ran aground west of Astoria, Oregon. If oil is discharged in the Columbia River, the spill can quickly move into Washington waters and shorelines.

A follow-up unannounced drill was successfully conducted shortly thereafter with the following results:

- Chevron completed all necessary notifications to state and federal agencies.
- Response contractors performed a safety assessment of the simulated spill site.
- Chevron mobilized their national response team and developed a travel plan.

Types of Drills	2003	2004	2005	2006
Spill Management Team Table-top Drills	32	35	23	16
Worst-case Scenario Table-top Drill	12	9	3	8
Deployment Drills	53	48	52	41
Geographic Response Plan Strategies Tested during Deployment Drills	15	17	22	17
Deployment Credit for Actual Spills	3	2	5	1
Major Unannounced Drills	1	1	8	0
Unannounced Vessel Notification Drills	164	248	431	434
Ecology Drills	2	3	3	1

TABLE 2
Oil spill drills since 2003. Though rule-making temporarily received heightened attention in 2006, unannounced vessel notification drills continue to be a program mainstay.

Ecology and Chevron learned several lessons from the drill:

- The need to improve communication between Chevron's corporate office and its Washington responders.
- The need for Chevron to gain more familiarity with Washington state agencies and tribes, and their role in approving resource protection decisions.

Due to Chevron's refusal to participate in the first drill, the Washington Legislature revised the state's law to ensure that vessel companies participate in mandatory unannounced drills in the future.

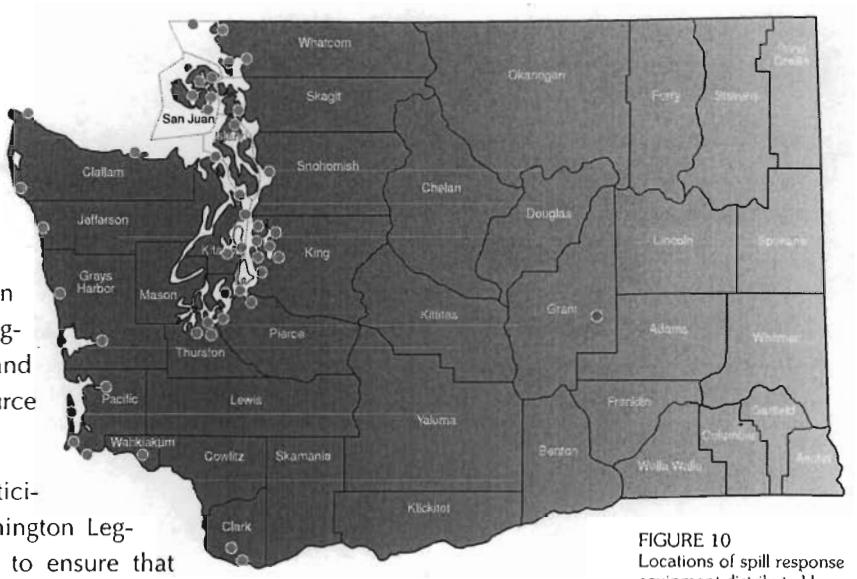


FIGURE 10
Locations of spill response equipment distributed by Ecology to improve local response to oil spills.

Agreements with Private Spill Response Contractors

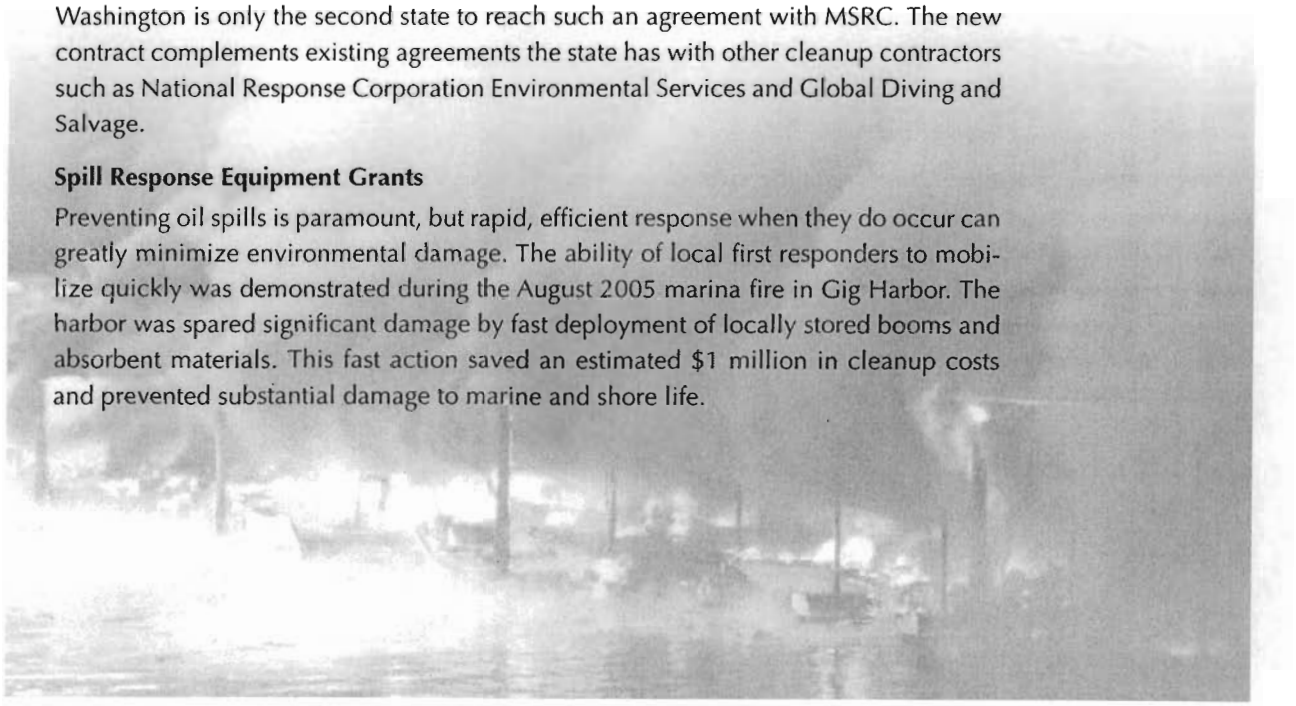
On September 14, 2006, Ecology signed a landmark agreement with Marine Spill Response Corporation (MSRC), the nation's largest private, non-profit oil spill response company. Now, if an oil spill occurs in state marine waters or the Columbia River and the responsible party is unknown, unwilling or incapable of mounting an effective response, MSRC's fleet can be used to minimize environmental impacts.

Such "orphan" oil spills cost Washington taxpayers millions of dollars in response and environmental repair. Under the agreement, Ecology will have access to MSRC's specialized vessels, equipment and response personnel in order to restrict the costs and limit the damages of oil spills.

Washington is only the second state to reach such an agreement with MSRC. The new contract complements existing agreements the state has with other cleanup contractors such as National Response Corporation Environmental Services and Global Diving and Salvage.

Spill Response Equipment Grants

Preventing oil spills is paramount, but rapid, efficient response when they do occur can greatly minimize environmental damage. The ability of local first responders to mobilize quickly was demonstrated during the August 2005 marina fire in Gig Harbor. The harbor was spared significant damage by fast deployment of locally stored booms and absorbent materials. This fast action saved an estimated $1 million in cleanup costs and prevented substantial damage to marine and shore life.



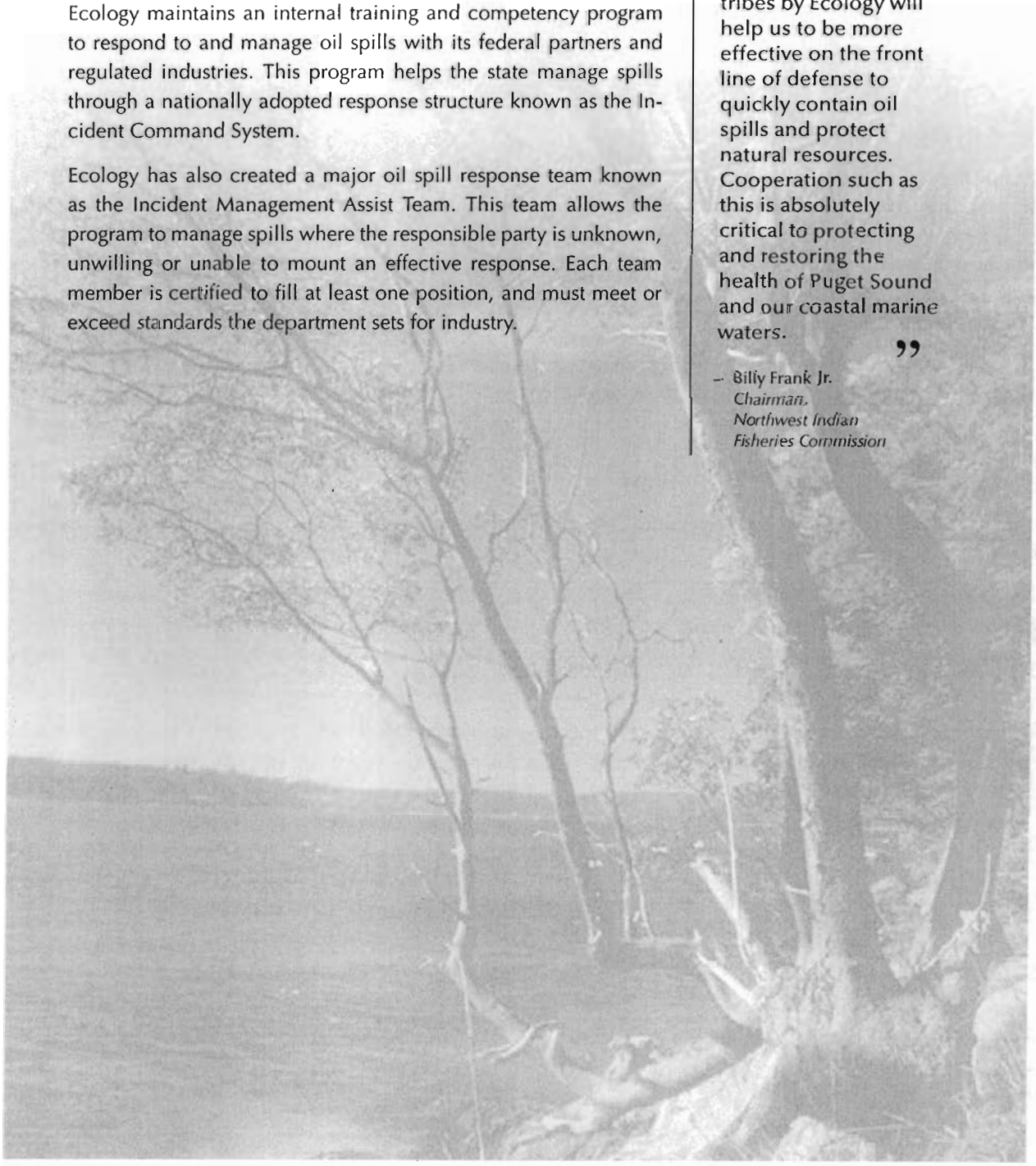
In 2006, Washington lawmakers gave Ecology $1.45 million from the Local Toxics Control Account to provide emergency spill response equipment and training to local governments and tribes across the state. Ecology delivered or planned delivery of oil spill response equipment to 46 communities (see Figure 10). The first delivery was to the Port of Seattle at Fisherman's Terminal on September 28, 2006. Ecology will complete distribution of response equipment to 75 communities by June 30, 2007. Ecology is also training about 700 first-responders on how to use the equipment.

Ensuring Ecology Response Readiness

Ecology maintains an internal training and competency program to respond to and manage oil spills with its federal partners and regulated industries. This program helps the state manage spills through a nationally adopted response structure known as the Incident Command System.

Ecology has also created a major oil spill response team known as the Incident Management Assist Team. This team allows the program to manage spills where the responsible party is unknown, unwilling or unable to mount an effective response. Each team member is certified to fill at least one position, and must meet or exceed standards the department sets for industry.

> "The oil spill response equipment and training provided to tribes by Ecology will help us to be more effective on the front line of defense to quickly contain oil spills and protect natural resources. Cooperation such as this is absolutely critical to protecting and restoring the health of Puget Sound and our coastal marine waters."
>
> – Billy Frank Jr.
> *Chairman,*
> *Northwest Indian*
> *Fisheries Commission*



Spill Response Actions

Ecology provides 24/7 coverage to respond and manage oil spills, hazardous material incidents, clandestine drug lab cleanups and other environmental emergencies across the state. Although "Zero-Spills" is the ultimate goal, Ecology must have trained and organized spill responders to combat spills wherever and whenever they occur.

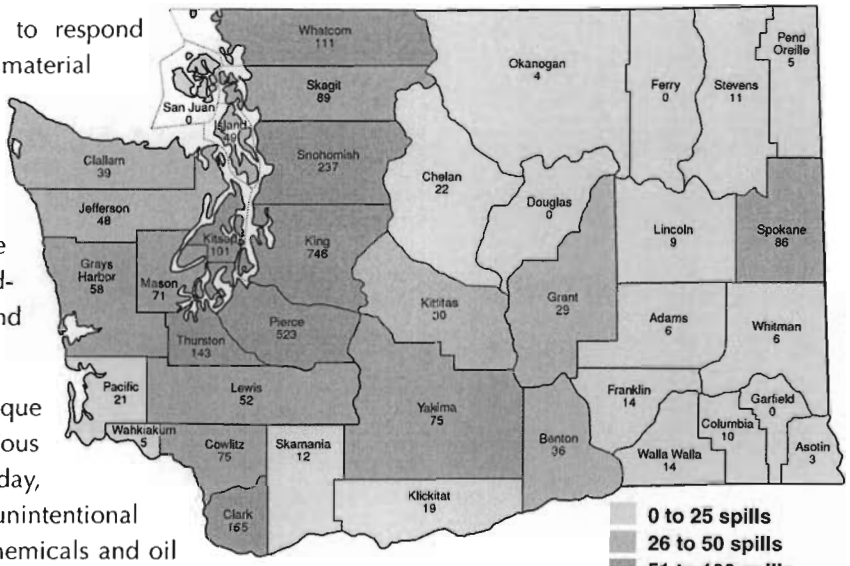


FIGURE 11
Reported chemical, oil and hazardous waste spills in 2006, by county.

In 2006 Ecology received 3,887 unique reports of chemical, oil and hazardous waste spills statewide. On any day, there may be many illegal dumps, unintentional releases of pesticides and other chemicals and oil spills that enter state waters. Of the nearly 3,900 immediate threats to public health and the environment, the agency mounted a field response to 1,186 (see Figure 11). Here are some of Ecology's important response accomplishments in 2006:

Derelict Ship – the *S.S. Catala*

The *S.S. Catala* ran aground near Ocean Shores on January 1, 1965. Over the years, the ship almost disappeared beneath the sand. In recent years, strong winds and shifting currents peeled back the sand, exposing the rusty hull at the surface. The shipwreck is located on a popular recreational beach in an ecologically rich area, which is internationally recognized as a significant bird habitat and a migratory pathway. It presented both a public safety and environmental risk.

On April 11, 2006, a beachcomber noticed oil inside the exposed shipwreck's hull. The Coast Guard placed a temporary patch over the hole to prevent the oil from being disturbed or spilled.

On July 31, 2006, cleanup contractors hired by Ecology began constructing a containment wall to allow workers to safely remove sand and water from deeply buried portions of the ship and to control any oil that may have been inadvertently released during cleanup

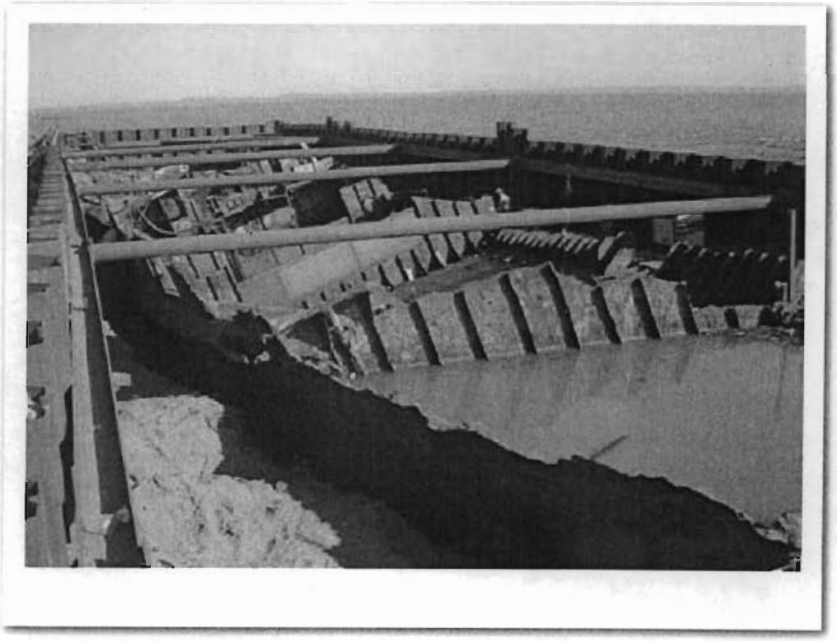


FIGURE 12
The hull of the *S.S. Catala*, surrounded by a newly constructed containment wall, at rest near Ocean Shores.

(see Figure 12). This steel wall enclosure was completed in late September and is routinely monitored and checked after storms. Contractors also cut away portions of the ship to reach the tops of the oil tanks. Four of five tanks have been emptied and cleaned (see Figure 13).

To date, contractors have recovered and recycled more than 31,000 gallons of heavy fuel oil and removed over 1,300 cubic yards of oil-contaminated sand. To help restore the area, responders piled more than 1,300 cubic yards of clean sand onto the site and shipped over 350,000 gallons of oil-contaminated water off-site for treatment.

The site was closed for the winter on October 20, 2006. Cleanup work will resume in the spring of 2007.

FIGURE 13
Cleanup contractors have removed more than 31,000 gallons of heavy fuel oil from the tanks of the *S.S. Catala*.

Polar Texas/ConocoPhillips Penalty

After a detailed investigation, Ecology and the Coast Guard determined that the *Polar Texas* was the source of over 1,000 gallons of crude oil that affected Vashon Island in King County on October 14, 2004. On the two-year anniversary of the spill, Polar Tankers, Inc. (a subsidiary of ConocoPhillips Co.) paid a $540,000 fine levied by Ecology. The penalty is the largest Ecology has ever issued for a spill to marine waters and is the maximum penalty possible under state law. The violations included:

- Negligence and liability for illegally spilling oil to state waters.
- Failing to clean up the spill.
- Failing to follow ConocoPhillip's state-approved contingency plan.
- Failing to notify state and federal response agencies of the spill.

Proceeds of the penalty were deposited in Ecology's Vessel Response Account, which helps pay state costs to station a rescue tug at Neah Bay. Negotiations continue on a natural resource damage assessment separate from the penalty.

Puget Sound Energy Spill at Crystal Mountain

Emergency cleanup crews from Ecology, Puget Sound Energy (PSE), EPA and the U.S. Forest Service worked together to contain and clean up an estimated 18,200-gallon diesel fuel spill from a

FIGURE 14
Spill responders drilling wells to locate and clean up subsurface, spilled diesel fuel.

PSE backup electricity generator located on Mount Baker-Snoqualmie National Forest land below the Crystal Mountain ski area. The spill was first detected on November 3, 2006, and its cause is still under investigation.

Battling floods, snow storms, road closures and power outages, cleanup crews removed almost 7,000 gallons of diesel fuel and 622 truckloads of diesel-contaminated soils (see Figure 14). Response personnel also cleared trees from the area and constructed a 150-foot long trench designed to keep fuel from entering Silver Creek. The spill site is located about 6 miles upstream from the junction of Silver Creek with the White River in rural Pierce County. The creek and White River are important trout and salmon-bearing streams.

Longer-term cleanup and investigation will continue until the environmental risk is removed. The Spills Program is working with PSE to develop a transition plan for prolonged cleanup management with Ecology's Toxics Cleanup Program.

Holiday Disasters Averted on the Outer Coast

Ecology responded to three incidents during the final week of 2006. These incidents highlight the constant risk of oil spills and the value of the program's precautionary approach. On December 27, the *Nancy Jo*, a 334-foot tank barge loaded with nearly 1.5 million gallons of heavy fuel oil, went adrift about 25 miles west of Ocean Shores. The tank barge, bound for the Columbia River, was being towed by the tug *James T Quigg* when the tow wire parted at a point on the deck of the barge.

The crew of the *James T Quigg* was able to reattach to the tank barge. Accompanied by the sister tug *Millennium Star*, the ships crossed the treacherous Columbia River bar and proceeded safely to harbor in Astoria, Oregon, late on December 28. Ecology personnel closely monitored the situation in coordination with the Coast Guard and assisted in the investigation when the vessel arrived in port. Ecology also alerted MSRC's responders on the Columbia River, taking advantage of its new agreement.

> "I am proud of the partnership we have with Ecology. Working together we have been able to advance creative initiatives leading to one of the better spill records in the country."
>
> – CAPT Bill Devereaux
> *13th District, United States Coast Guard*

On December 29, the fishing vessel *Oak Bay* began taking on water off of Cape Alava in Clallam County. Ecology closely monitored the incident as a Coast Guard helicopter assisted the vessel by dropping a dewatering pump to the ship. The ship returned to Neah Bay without additional aid.

On late December 31, the fishing vessel *Grand Pacific* went adrift near Cape Alava. Sea conditions were worsening when the *Crowley Gladiator*, the new state-funded rescue tug, attached itself to the disabled vessel and towed it back to Neah Bay.

Illicit Drug Labs

Ecology continues to be the only public agency in Washington cleaning up clandestine drug labs. Since 1989, Ecology has handled roughly 15,000 labs or dumpsites. Cleanup activity peaked in 2001 and has declined each year since. Law enforcement intelligence suggests the decline corresponds with inexpensive drugs manufactured in Mexico entering the United States.

In 2006, Ecology received 390 reports of drug labs or dumpsites. Responders removed dangerous chemicals and hazardous wastes from all these sites (see Figure 15). Because

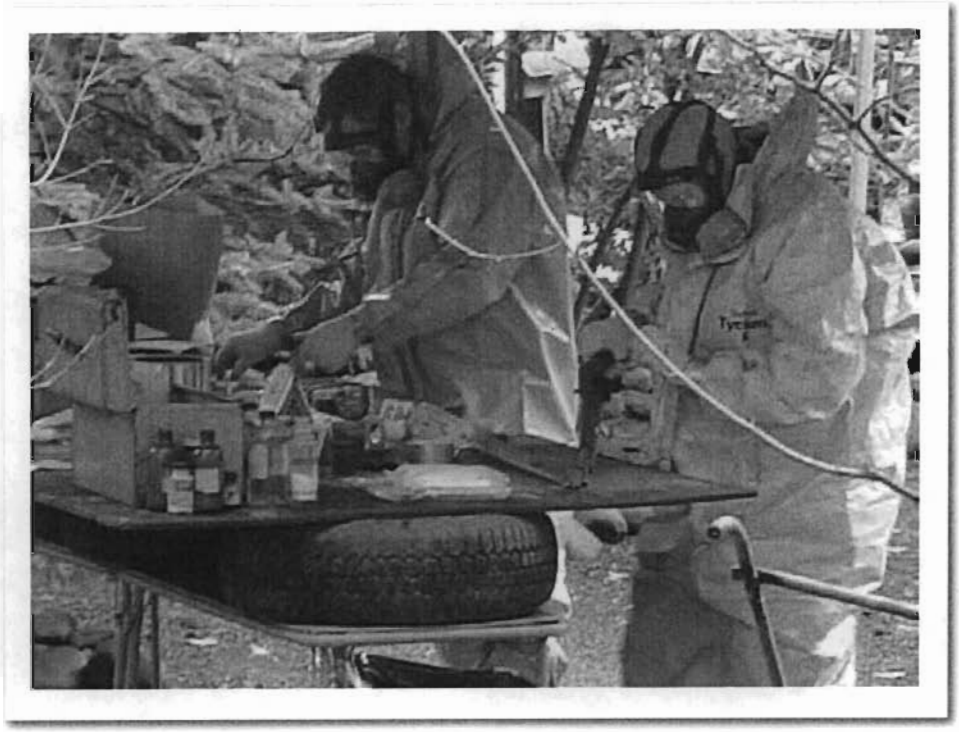


FIGURE 15
Ecology responders clean up dangerous chemicals at a meth lab discovered near Vancouver in 2006.

of continued coordination with local governments and authorities, response costs are declining due to arrangements to batch similar lab chemicals together for quicker, more efficient disposal. Ecology has installed chemical lockers at law enforcement centers throughout the state that temporarily store hazardous waste until Ecology can remove and dispose of it. In 2006, approximately 44% of all drug labs or dumpsites were disposed of through batch pick-ups.

Community Training and Beach Watcher Program

The Beach Watcher program trains people to recognize and report spilled oil. Participants also learn to distinguish oil from natural phenomena, such as algal and bacterial mats, which are frequently mistaken and reported as oil. This outreach and education effort assists Ecology initiate faster, less expensive and more efficient cleanups. Ecology held 10 training classes in 2006 for interested community groups (see Table 3).

Community groups have also provided Ecology with local telephone contacts, property access, information on staging areas, directions to affected beaches and local services. On several occasions when Ecology was notified of potential incidents, Beach Watcher trained field observers investigated the reports. They provided critical information and photographic documentation to Ecology, so that timelier response decisions could be made.

Beach Watcher Community Groups Trained in 2006
Clallam County Beach Watchers
Des Moines 'People for Puget Sound'
Island County Beach Watchers
Point Roberts Marina
San Juan County Beach Watchers
Skagit County Beach Watchers
Snohomish County Beach Watchers
USCG Auxiliary Anacortes
Vashon Oil Spill Information and Citizen Education
Vashon Quartermaster Yacht Club

TABLE 3
Ecology-trained Beach Watcher groups.

Remote Sensing and Aerial Observation

In 2006, Ecology entered into a unique agreement with the King County Sheriff's Office. Ecology provided $140,000 to install special software and Forward Looking Infrared (FLIR) equipment on two sheriff's office helicop-

ters. Oil has a heat signature that is different than water; therefore the new equipment can spot and track oil spills at night and during storms.

Ecology used the helicopters four times in 2006. In all cases, they provided the fastest possible assessment of the spills. Based on the information the helicopters gathered, Ecology responders were able to implement more effective short-term response strategies.

King County deputies also received specialized oil spill aerial recognition and volume determination training. They were given specialized mapping equipment and software to produce necessary information for Ecology to make timely response decisions.

Ecology also has access to FLIR-equipped, fixed-wing aircraft operated by the Washington State Patrol (WSP). A service agreement between Ecology and WSP provides random over-flight patrols, as well as response to reported spills throughout the state.

Response to Changing Workloads

The number of drug lab cleanups, especially in eastern Washington, dropped off in 2006. Meanwhile, the number of reported oil and hazardous material spills in western Washington increased. This shift in workload, combined with an increased focus on Puget Sound through Governor Gregoire's Puget Sound Initiative, convinced Ecology to shift resources to meet spill-response demands. Ecology moved two staff positions from Ecology's office in Spokane and one staff position from Ecology's office in Yakima to Ecology's offices in Olympia and Bellevue.

In 2006, state lawmakers appropriated funds for Ecology to locate an additional spill responder in Bellingham. Another responder will be hired for the Bellingham office in early 2007. These positions will mirror the agency's success in placing responders at Ecology's Vancouver office in the past.

Enforcement Activities

Enforcement actions provide an incentive for companies to prevent spills and meet preparedness and response standards. These actions ensure a level playing field for industry and influence future behavior.

In 2006, Ecology's spill responders issued 43 citations for small oil spills. For spills that were determined to be negligent and preventable, 13 more substantial penalties were issued. These citations and penalties totaled nearly $650,000.

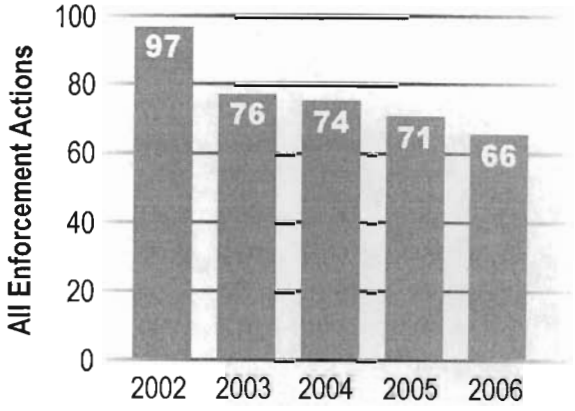


FIGURE 16
Enforcement actions issued 2002-2006. The downward trend reflects fewer spills and increased compliance with state spill prevention and readiness requirements.

Other enforcement actions, such as notices of violation and administrative orders, were also issued to require actions to prevent or prepare for oil spills (see Figure 16).

Enforcement Related Investigations

Ecology conducts in-depth investigations for major spill incidents that analyze root causes, examine negligence issues and estimate spill volumes. Although investigations often lead to enforcement actions, they sometimes identify new prevention measures to recommend to industry. Last year, Ecology produced four advisory bulletins on spill prevention and maritime safety. Such bulletins are distributed to industry and posted on Ecology's Web site. Ecology also provides recommendations for safe fueling and oil transfer procedures as well as actions to take if a vessel loses steering or propulsion.

Public Compensation for Oil Spills

All oil spills that reach state waters cause environmental harm. Natural resource damage assessments are conducted for spills of more than 25 gallons to surface water by the Resource Damage Assessment Committee. The committee includes representatives from the departments of Ecology, Fish and Wildlife, Natural Resources, and Community, Trade and Economic Development, and the Washington Parks and Recreation Commission.

The committee uses a special oil spill compensation schedule based on the type of oil spilled and a predetermined value for natural resources in the spill area. The model provides a monetary value of damages ranging from $1 to $50 per gallon of oil spilled. Responsible parties can either pay for habitat restoration projects directly or put resource damage assessment money into the state's Coastal Protection Account. The committee uses the funds for environmental restoration projects.

Collecting and investing in resource damages varies from year to year. Activities are driven by the number of oil spills, speed of investigations and collections, and determination of appropriate restoration projects. In 2006, Ecology collected almost $47,000 from past oil spill incidents and assessed nearly $42,000 in new damage assessments. The agency also invested more than $400,000 for 14 projects.

Significant projects initiated in 2006 include:

- Removing creosote-contaminated wood from Dungeness Spit and Lake Hancock in Clallam County.
- Purchasing 203 acres of shoreline habitat in Eld Inlet in Thurston County.
- Restoring intertidal beach adjacent to Chimicum Creek in Jefferson County.
- Removing bulkheads near Frye Cove County Park in Thurston County.
- Restoring fish passage in the Elk River estuary in Grays Harbor County.
- Enhancing shoreline access at Les Davis State Park in Pierce County.

Tenyo Maru Habitat Restoration

Tribal, state and federal officials completed plans for a $5.2 million habitat restoration campaign to offset environmental damages from the 1991 *Tenyo Maru* oil spill. The cornerstone of the plan, agreed to on the spill's 15th anniversary, is 200 years of federal protection for 900 acres of old growth coastal forest near Neah Bay and Teal Slough on Willapa Bay. The protected lands are critical nesting habitat for the federally-protected marbled murrelet (see Figure 17).

The owner of the *Tuo Hai*, the Chinese freighter that collided with the *Tenyo Maru*, paid a $9 million penalty that went into a special fund created by tribal, state and federal agencies. The first $3.8 million of the penalty went to recover response expenses. The other $5.2 million was earmarked for restoration and preservation projects.

FIGURE 17
Old growth habitat is critical for the threatened marbled murrelet.

Photo: Tom Hamer

The restoration monies have been used to help pay for stationing a rescue tug at Neah Bay, undertaking scientific studies about nesting sites, conducting a long-term seabird census, producing educational posters, and acquiring conservation easements. Land purchases include:

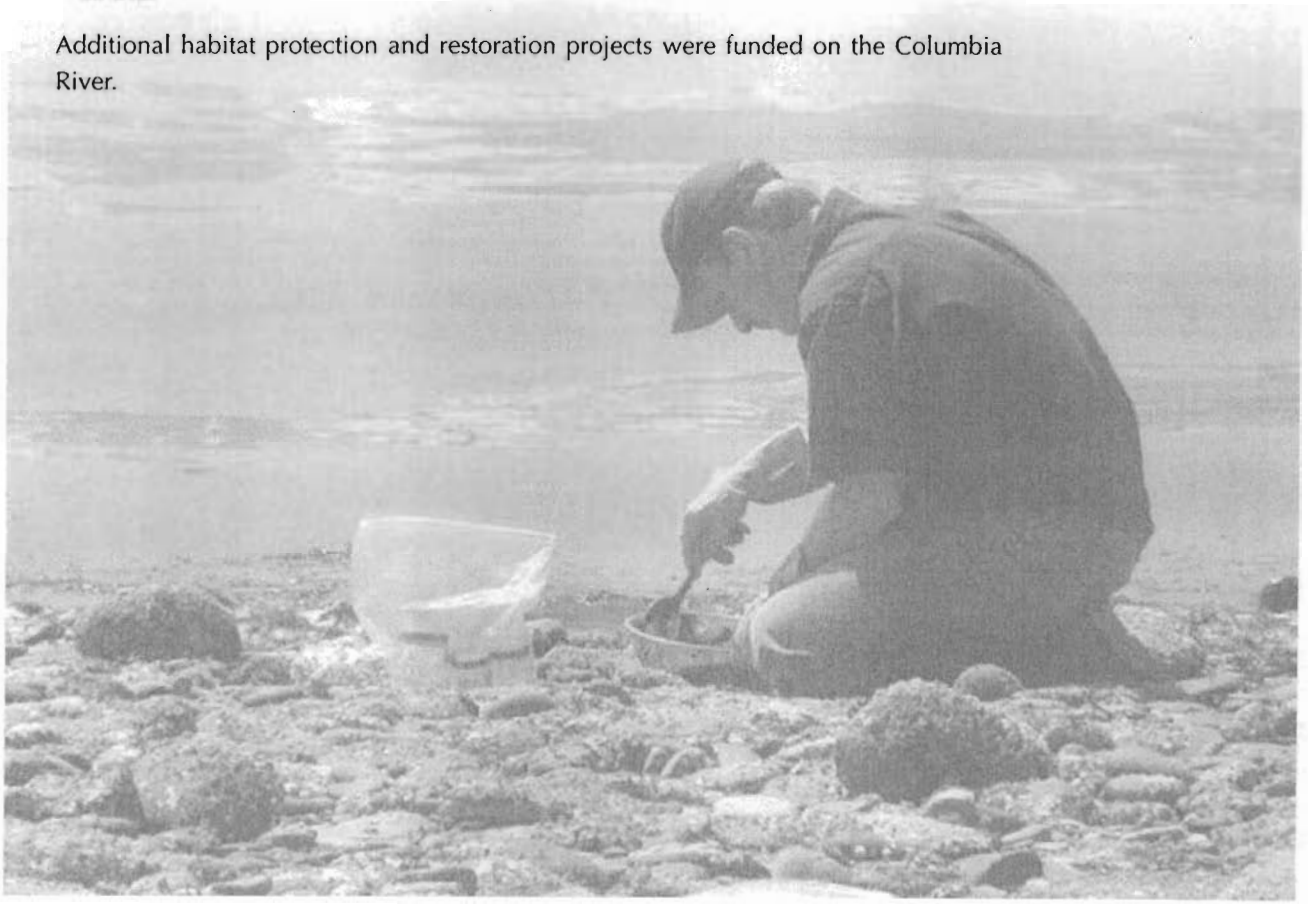
- 278-acre parcel in Waatch Valley in Clallam County ($1.4 million).
- 277-acre parcel at Anderson Point in Clallam County ($2.1 million).
- 345-acre parcel at Teal Slough on Willapa Bay in Pacific County ($1.2 million).

Sites Receive Restoration Grants from the National Fish and Wildlife Foundation

As a result of a $1.7 million criminal case settlement with Evergreen International Shipping Line, Ecology identified 14 projects to restore and protect important habitat areas in Puget Sound, Hood Canal and associated marine waters. The money came from the National Fish and Wildlife Foundation's Puget Sound Marine Conservation Fund. The projects include:

- Restoring salt marsh and intertidal habitats in the Nisqually Delta in Thurston and Pierce counties.
- Restoring the Dungeness River Estuary in Clallam County.
- Restoring the Qwuloot Estuary in Snohomish County.
- Removing derelict fishing gear from the Northwest Straits in San Juan County.
- Removing creosote-contaminated bulkheads on Protection Island in Jefferson County.
- Expanding the Whale Sighting Network and other educational programs in Puget Sound.

Additional habitat protection and restoration projects were funded on the Columbia River.



New Initiatives

Ecology will take steps to seek sustainable program funding in the near future. Sustainable funding is needed to continue progress in spill prevention, preparedness and response. In the meantime, Ecology will launch a number of new initiatives and expand its existing, essential work. This includes:

Intensifying Efforts to Prevent Spills by Addressing Root Causes

- **Vessel and Facility Oil Transfer Inspections**: Ecology's 6 new oil transfer inspectors will be teamed with existing maritime and engineering professionals to exert a stronger presence on Puget Sound, the Columbia River and the outer coast.
- **Rescue Tug**: Seek federal assistance to complement the existing state appropriations for the Neah Bay rescue tug.
- **Coastal Shipping Practices**: Work with industry, the Coast Guard and other stakeholders to review industry's coastal shipping practices, including towing of oil barges during storms.
- **Vessel Inspection Program**: Work with industry, the Coast Guard and other stakeholders to raise inspection standards for fishing, passenger and cargo vessels. Use this process to update the state's voluntary tank vessel compliance programs (ECOPRO and VBAP).
- **Tug Escort System**: Work with the Coast Guard, industry and other stakeholders to complete the "human factors" component of the Tug Escort Study.

Continue Aiming for the Best Spill Readiness Program in the Nation

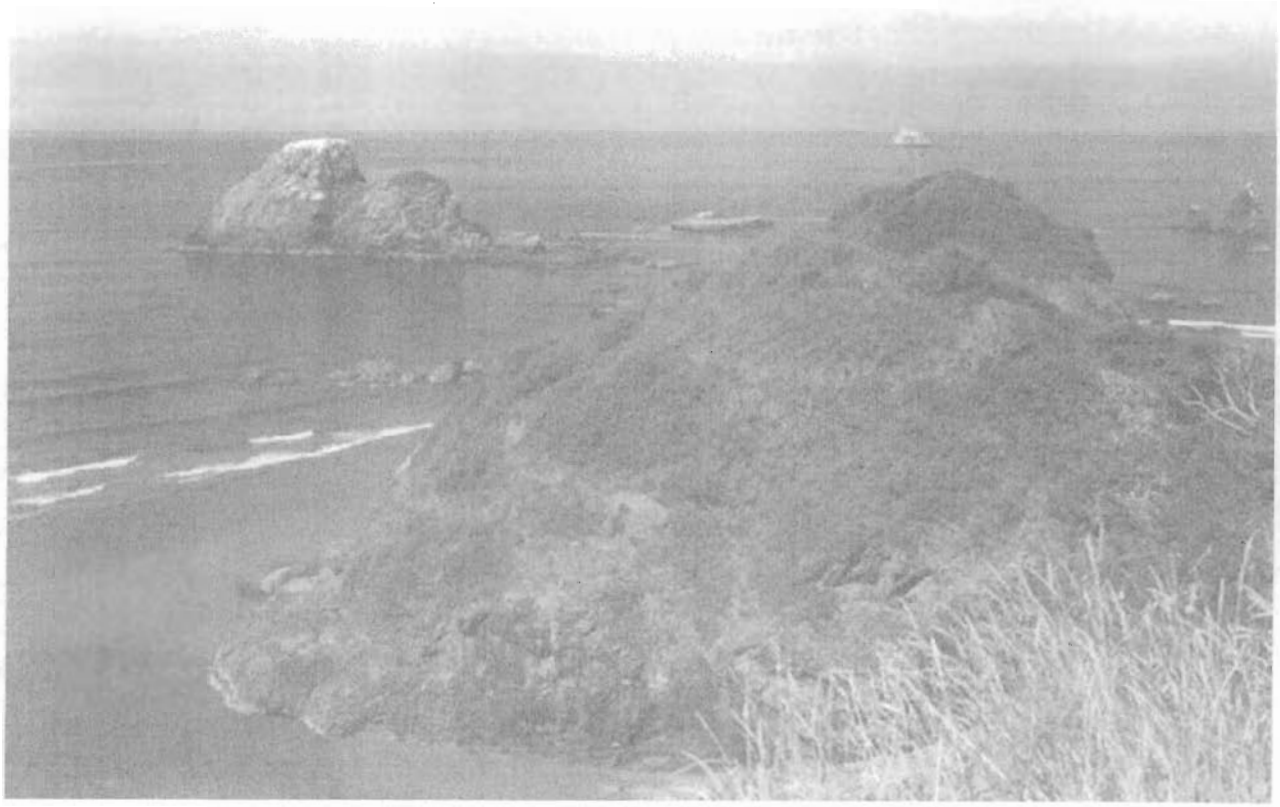
- **New Industry Response Standards**: Use the new contingency plan requirements to ensure that response equipment is available in sensitive areas, well-maintained, and appropriate for the water body with fully trained personnel ready to aggressively respond to spills.
- **Transboundary Spills**: Improve the region's ability to co-manage transboundary spill incidents with British Columbia, Oregon and Idaho.
- **Oiled Wildlife Care**: Improve the community's ability to perform oiled wildlife rescue and rehabilitation.
- **Tribal and Local Community Readiness**: Provide oil spill response training and equipment to local first responders to enhance timeliness and effectiveness of initial spill response.
- **State Readiness**: Refine Ecology's Incident Management Assist Team and procedures to strengthen the state's ability to effectively respond to major spills.
- **Unannounced Drills**: Strategically design and implement unannounced vessel and facility drills to deliberately test response systems, training, maintenance, policies and plans to ensure industry readiness.
- **Geographic Response Plans**: Revise marine response plans for the outer coast and Strait of Juan de Fuca, and develop inland plans for the Snohomish watershed.

Rapidly and Aggressively Responding to Spills

- **Local Community Protection**: Deliver oil and hazardous material spill response services from 6 field offices across the state, including a new office in Bellingham; and evaluate whether response personnel should be stationed in new areas of the state, such as Port Angeles.
- **State-of-the-Art Response Technology**: Assess and ensure that industry invests in state-of-the-art technology to provide a rapid, effective response.
- **Natural Resource Damage Assessment**: Evaluate and potentially update the state damage assessment rules to reflect current natural resource values.
- **Habitat Restoration**: Ensure that money collected from damage assessments is invested in the highest priority environmental projects.

Strengthening Existing Federal Partnership

- **State/Federal Summit**: Organize a spill prevention and response summit with the Coast Guard, as directed by Governor Gregoire.
- **State Authority**: Work with the Coast Guard, Congressional Delegation, state Legislature and others to protect state authority and ensure compatibility with federal requirements.
- **Coast Guard Partnership**: Update interagency agreements with the Coast Guard to minimize duplication and maximize resource effectiveness in our respective oil spill programs.
- **Public Education**: Place additional emphasis on public education and outreach in communicating oil spill prevention, preparedness and response.



WASHINGTON STATE
DEPARTMENT OF
ECOLOGY

WSPA

Western States Petroleum Association

February 27, 2007

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National Marine Fisheries Service
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Email: orca.plan@noaa.gov

Re: Comments of Western States Petroleum Association on Why the National Marine Fisheries Service Should Postpone the Issuance of the Draft Recovery Plan for Southern Resident Killer Whales and Conduct a More Open, Collaborative Recovery Planning Process

The Western States Petroleum Association ("WSPA") appreciates the opportunity to provide the National Marine Fisheries Service ("NMFS") with the following comments and information to assist NMFS in its development of a recovery plan for Southern Resident killer whales (*Orcinus orca*).[1] WSPA represents commercial marine transport companies, oil terminals, refineries, and pipelines in Puget Sound, Washington, and on the West Coast of the United States. Member companies operate marine vessels that transport a range of crude oil, petroleum products, and other economically important materials to and from ports on the West Coast. Continued safe, secure, efficient, and environmentally-responsible operation of member vessels and facilities are issues of regional and national importance.

As indicated in our previous comments, WSPA and its member companies support responsible and informed environmental stewardship.[2] However, notwithstanding WSPA's suggestions to date, NMFS has not used an open, collaborative process to develop the draft recovery plan, and as a result, the draft plan does not contain site-specific recovery actions, or objective, measurable recovery criteria as required by Section 4(f) of the ESA. In addition, NMFS' failure to adequately disclose the social, economic, and environmental impacts of critical habitat designation and recovery activities makes it impossible to evaluate whether the agency's actions will result in rationale, cost-effective programs to conserve killer whales. To remedy these errors, WSPA recommends the following:

(1) NMFS should postpone its issuance of a final recovery plan, and convene a recovery team consisting of recognized experts from public and private sectors to assist the agency in developing site-specific recovery actions, and objective, measurable recovery criteria;

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[1] See 71 Fed. Reg. 69101 (November 29, 2006).

[2] On July 3, 2006, WSPA provided preliminary comments on a draft conservation plan that NMFS previously prepared under the Marine Mammal Protection Act ("MMPA"). On August 11, 2006, WSPA provided extensive comments in response to the Agency's proposed rule to designate critical habitat for the species. We are enclosing copies of these comments for NMFS' inclusion in the administrative record for the draft recovery plan.

(2) NMFS should comply with the National Environmental Policy Act ("NEPA") by preparing an Environmental Impact Statement ("EIS") analyzing the social, economic, and environmental impacts of critical habitat designation and recovery plan activities;

(3) NMFS should coordinate its development of a killer whale recovery plan with other conservation planning activities in Puget Sound, Washington, including Chinook salmon recovery planning;

(4) NMFS should reevaluate its listing of Southern Resident killer whales in view of existing uncertainties and new information regarding the species' life history and present range; and

(5) NMFS should clarify the potential risks of oil spills, environmental contaminants, and vessel noise to avoid misinterpretation of agency conclusions.

We summarize below our specific procedural and substantive comments on the recovery plan. We would be happy to discuss these comments in more detail, and to assist NMFS in formulating a recovery plan that complies with the requirements of the ESA.

I. Procedural Comments Concerning the Draft Recovery Plan

A. Statutory Requirements for Recovery Plan Development

As explained in *Defenders of Wildlife v. Babbit*,[3] Section 4(f) of the ESA requires NMFS to develop and implement a recovery plan for the conservation and survival of listed species. A recovery plan is supposed to be a basic road map to species recovery, i.e., a process that stops or reverses the decline of a species and neutralizes threats to its existence. Such a plan must, to the maximum extent practicable, include:

(1) A description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;

(2) Objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

(3) Estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.[4]

As courts have explained, the phrase "to the maximum extent practicable" does not permit NMFS unbridled discretion; rather, it imposes a clear duty on the agency to fulfill the statutory

[3] See Defenders of Wildlife v. Babbitt, 130 F.Supp.2d 121 (D. D.C., Feb. 12, 2001).

[4] See 16 U.S.C. § 1533(f)(1)(B)(i)-(iii).

command of identifying actions, criteria, and time estimates to the extent that it is feasible or possible.[5]

In examining the requirements of ESA Section 4(f), courts have stated that NMFS shall, to the maximum extent practicable, incorporate into each recovery plan "a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species."[6] Stated differently, the ESA requires NMFS to identify site-specific actions necessary to achieve species recovery. A recovery plan that simply recognizes threats to a listed species, or identifies general classes of recovery actions, but fails to recommend specific corrective actions or explain why it is impracticable or unnecessary to recommend such actions, does not meet the requirements of the ESA.[7]

Aside from the requirement to identify site-specific actions necessary to achieve recovery, NMFS must, to the maximum extent practicable, incorporate into the recovery plan "objective, measurable criteria which, when met, would result in a determination...that the species be removed from the list."[8] The objective, measurable criteria must be directed towards the goal of removing the endangered or threatened species from the list.[9] In designing such criteria, NMFS must address each of the five statutory listing factors,[10] incorporating objective, measurable criteria to determine whether threats to the species have been ameliorated.[11]

WSPA has reviewed the draft recovery plan, and has evaluated the plan's compliance with applicable legal requirements and agency policies. We offer the following brief assessment of the draft plan to assist NMFS in its revisions, and to encourage an open dialogue on these matters.

1. The draft recovery plan fails to identify site-specific recovery actions.

Section 4(f)(1)(B)(i) of the ESA requires NMFS to identify in a recovery plan site-specific actions necessary to achieve species recovery.[12] NMFS must also explain its selection of particular actions, and provide a rational basis for its selection.

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[5] See Fund for Animals v. National Audubon Soc., 903 F.Supp. 96 (D. D.C., Sept. 29, 1995).

[6] See Defenders of Wildlife, 130 F.Supp.2d at 132; see also 16 U.S.C. § 1533(f)(1)(B)(i)

[7] See Fund for Animals, 903 F.Supp. 96.

[8] See 16 U.S.C. § 1533(f)(1)(B)(ii).

[9] See Defenders of Wildlife, 130 F.Supp.2d at 132.

[10] Such listing factors include including (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors. See 16 U.S.C. § 1533 (a)(1).

[11] Id.

[12] See 16 U.S.C. § 1533(f)(1)(B)(i).

The draft plan contains an "outline" and "description" of actions NMFS concludes necessary for species recovery. However, the general list of actions and associated narratives fail to meaningfully explain how these actions will be implemented. For example, Recovery Action 1.1.2, entitled "Support regional restoration efforts for other prey species" is explained to mean "support and conservation and recovery measures."[13] It is unclear which conservation measures NMFS intends to support, how NMFS will support such measures, and why support of such measures will in fact result in species recovery. These are details that NMFS must incorporate into each recovery action where feasible, or in the alternative, NMFS must provide a rational explanation why it is not feasible to do so. Failing to provide site-specific details defeats the usefulness of the recovery plan, and will make it impossible to use the plan as a "roadmap for species recovery" as Congress intended.

2. The draft recovery plan fails to incorporate objective, measurable recovery criteria which when met would lead to species delisting.

Section 4(f)(1)(B)(ii) of the ESA requires NMFS to identify objective, measurable criteria in a recovery plan which when met, would result in the species being delisted, or by extension, being reclassified from endangered to threatened.[14] As the courts have stated, NMFS must identify objective, measurable criteria for each of the factors that have led to the species' decline to measure whether threats to the species have been ameliorated.[15]

NMFS has identified in some detail biological criteria the listed distinct population segment ("DPS") must meet for the species to be delisted, or reclassified from endangered to threatened.[16] The delisting criteria identified by NMFS require the species to be listed for at least 28 years regardless whether threats to the species are adequately addressed prior to the expiration of this period. This delisting criterion conflicts with ESA Section 4(a) because it effectively "decouples" species abundance from the five statutory factors that NMFS must consider when listing and delisting species.[17] Stated differently, even if each of the five statutory listing factors are addressed in a time period of less than 28 years, NMFS may be precluded from delisting the species prior to the end of the 28-year period. It is highly doubtful that Congress intended this result when enacting the ESA. Such a result may also serve to discourage parties from undertaking recovery actions because NMFS has effectively eliminated the incentive of species delisting in the foreseeable near-term.

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[13] See Draft Recovery Plan at 135.

[14] See 16 U.S.C. § 1533(f)(1)(B)(ii).

[15] See Defenders of Wildlife, 130 F.Supp.2d at 133.

[16] Specifically, the DPS must exhibit an increasing population trend at an annual average growth rate of 2.3 percent per year for 28 years to warrant delisting. At this rate of increase, the population level would increase from about 81 animals in 2001 to about 155 animals by 2029. See Draft Recovery Plan at 120-121.

[17] See Defenders of Wildlife, 130 F.Supp.2d at 133; Fund for Animals, 903 F.Supp. at 111.

Aside from the structure of NMFS' delisting criteria, many of the delisting criteria associated with the five statutory listing factors are neither objective, nor are they measurable. For example, one criteria for delisting is that an "increase" in knowledge of species distribution, and habitat use species must occur.[18] It is unclear how NMFS will objectively measure such an increase – how much of an increase in knowledge is required, and how will NMFS measure this increase? This is but one example of vague criteria that are likely impossible to objectively measure. Ultimately, NMFS fails to explain in rational way how it will objectively measure threats to the species to judge when delisting or reclassification is appropriate. This is problematic, and sets up a situation where no party except NMFS knows when appropriate delisting criteria have been achieved. This result is arbitrary, and it is not consistent with the requirements of ESA Section 4(f).

3. The draft recovery plan fails to incorporate rational estimates of the time and cost of site-specific recovery actions.

Section 4(f)(1)(B)(iii) of the ESA requires NMFS to incorporate into recovery plans the time and cost required to implement site-specific recovery activities.[19] The draft plan fails to provide any discussion or analysis of time and cost estimates for recovery actions aside from conclusions contained in a table provided at the end of the document. Many of the recovery actions listed in the table contain cryptic estimates of costs, while cost estimates for several recovery actions are omitted entirely. Similarly, no discussion is provided how NMFS derived time estimates for specific recovery actions.

Estimating the time and cost of recovery activities is very important; however, NMFS appears to have spent little time or effort developing such estimates. NMFS does not explain how it has arrived at its estimates, and as a result we are unable to assess or comment upon them. This is troubling because absent reliable estimates, NMFS has not complied with the Section 4(f) of the ESA by disclosing the cost or timeline of site-specific recovery actions. These infirmities are compounded by NMFS' failure to comply with NEPA during its development of a proposed rule to designate critical habitat for the species. Such infirmities could be addressed through the development of a comprehensive EIS for both critical habitat designation and recovery plan activities.

B. <u>Process Used to Develop Recovery Plan and Critical Habitat</u>

1. While agency policies encourage the use of recovery teams and multi-species recovery plans to address species such as killer whales, NMFS has failed to follow such policies, creating the risk of inconsistent and ineffective recovery actions.

[18] <u>See</u> Draft Recovery Plan at 124.

[19] <u>See</u> 16 U.S.C. § 1533(f)(1)(B)(iii).

As NMFS itself states, it is the policy of the agency in Puget Sound to "work collaboratively with local interests on Endangered Species Act programs and recovery plans."[20] As evidence of this policy, NMFS has spent considerable time and energy working collaboratively with stakeholders in Puget Sound and other areas to develop recovery plans for listed Chinook salmon and other salmonids – a key prey species for killer whales. In view of these recent processes, it is unclear why NMFS has elected, in the face of admitted uncertainty, to prepare a recovery plan for killer whales without formulating a recovery team, soliciting input from outside experts, and conducting other scientific, environmental, and economic analyses that have been completed for Puget Sound Chiniook salmon. This obvious inconsistency raises serious questions regarding the content and sufficiency of the draft killer whale recovery plan.[21]

The interagency cooperative policy on recovery plan participation and implementation published by NMFS and the U.S. Fish and Wildlife Service ("the Services") in 1994 is instructive regarding how NMFS should proceed in the development of a recovery plan for killer whales.[22] The policy contemplates that NMFS will use "outside expertise" in the form of a recovery team to develop and implement recovery plans "that will minimize the social and economic consequences of plan implementation." The interagency policy also contemplates that NMFS will develop "multiple species plans when possible," and that NMFS will "involve representatives from affected groups" during plan development.[23] Clearly, the Services have expressed a preference to involve recovery teams in the development of recovery plans to insure such plans fully consider the social, economic, and other impacts of recovery plan implementation. Failing to make use of a recovery team in the present case, particularly in the face of NMFS' failure to prepare an EIS for killer whale critical habitat designation, limits the agency's ability to understand the true social, economic, and environmental impacts of recovery plan implementation.

As discussed above, NMFS has engaged in an extensive recovery planning process for Puget Sound Chinook salmon that has resulted in many recommendations for action. NMFS' recovery planning policies contemplate the agency will undertake multi-species recovery plans when feasible. NMFS has not explained why it is not feasible to incorporate killer whale recovery planning into the ongoing Puget Sound Chinook salmon recovery planning process.

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[20] See Policy Statement of Northwest Region Concerning ESA Recovery Planning. Available at http://www.nwr.noaa.gov/Salmon-Recovery-Planning/Recovery-Domains/Puget-Sound/PS-Chinook-Plan.cfm (as of February 19, 2007).

[21] NMFS notes in Section I of the draft recovery plan that it held a series of meetings to gather input on potential management actions to include in the MMPA conservation plan. NMFS suggests this process conducted under the MMPA satisfies its obligations under the ESA. We disagree. It is clear that a recovery plan prepared under the ESA differs markedly from a conservation plan prepared under the MMPA. Further, the economic and regulatory implications of an ESA recovery plan differ substantially from those likely to occur as a result of an MMPA conservation plan. It is disingenuous for NMFS to claim credit for public processes undertaken under the MMPA when no party participating in that proceeding had knowledge that such a plan would be used to satisfy the agency's obligations under ESA Section 4(f).

[22] See 59 Fed. Reg. 34272 (July 1, 1994). We suggest that NMFS explain in detail its basis for deviating from the final interagency policy should it chose to do so in any final recovery plan.

[23] Id.

Failing to do so may hamper attempts to fully fund and implement species recovery plans in Puget Sound due to (1) inconsistent agency priorities, (2) unclear conservation standards, and (3) a lack of a clear, unified strategy to recover both species in a timely, cost-effective manner. Going forward, WSPA remains concerned that future ESA consultation activities will become cumbersome and difficult to complete because the agency has failed to harmonize the needs of salmonids and killer whales in Puget Sound. NMFS should explain why it has elected to deviate from a multi-species approach in this case, particularly in the face of the ongoing Puget Sound Chinook salmon recovery planning process.

2. NEPA requires NMFS to develop an EIS analyzing the social, economic, and environmental impacts of critical habitat designation and recovery activities.

NEPA requires federal agencies, including NMFS, to prepare an EIS for major federal actions which will "significantly affect the quality of the human environment."[24] NMFS policies seem to suggest that the agency is not required to comply with NEPA when designating critical habitat, when preparing a recovery plan, or when otherwise taking action under the ESA that could result in substantial economic, environmental and social impacts. For example, NMFS asserts in the final critical designation that it need not comply with the requirements of NEPA when designating critical habitat, citing a single Ninth Circuit case as authority for this position.[25] NMFS' failure to comply with NEPA during critical habitat designation compounds uncertainties in the recovery planning process because no comprehensive analysis exists to evaluate or understand the social, economic and other impacts of recovery actions.[26] This outcome is wholly inconsistent with congressional intent, and as a practical matter, the agency now possesses no objective basis to know the economic, social, and other impacts of its proposed conservation activities.

NMFS' current position on the application of NEPA to critical habitat has been addressed in several court cases and legal treatises. In *Catron County v. U.S. Fish & Wildlife Service* the Court of Appeals for the Tenth Circuit held that the Services must comply with NEPA in designating critical habitat, stating that doing so will inform the public, and help ensure that critical habitat designations do not result in unintended environmental consequences.[27] In 2004 the Federal District Court for Washington D.C. similarly concluded that NEPA applies to critical habitat designations under the ESA.[28] These cases, and the analysis contained in them, indicate that NEPA does apply to critical habitat designations, and that such compliance serves an

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[24] See Catron County v. U.S. Fish & Wildlife Service, 75 F.3d 1429 (10th Cir. 1996).

[25] See 71 Fed. Reg. 69054, 69060 (November 29, 2006).

[26] Both NMFS' recovery planning policies and the ESA itself require NMFS to consider the social and economic impacts of recovery actions when developing a recovery plan. See 16 U.S.C. 1533(f). The draft recovery plan fails to discuss these impacts in any detail, and thus the draft plan likely fails to comply with the ESA.

[27] See Catron County, 75 F.3d 1429.

[28] See Cape Hatteras Preservation Alliance v. U.S. Department of *Interior*, 344 F.Supp.2d 108 (November 1, 2004).

important function of informing the public, and assisting the agency in avoiding unintended environmental consequences.[29]

Given the fact that NMFS has failed to comply with NEPA in its designation of critical habitat, NMFS should now prepare an EIS analyzing the social, economic, and environmental impacts of critical habitat and recovery plan activities. Preparing such a document at this juncture would also assist NMFS in its development of site-specific recovery actions, objective recovery criteria, and cost estimates. By developing an EIS now NMFS could also engage in a more open, collaborative process with interested parties, thus insuring any final recovery plan reflects careful consideration of economic, social, and other issues that may impact the environment and species recovery.

C. NMFS Should Reevaluate the Species Listing in View of New Information

Significant legal and scientific uncertainties exist regarding the agency's listing of Southern Resident killer whales as an endangered species. These uncertainties, and new information about the species range,[30] suggest that NMFS should reevaluate its listing determination. Such a reevaluation may yield important information that substantially impacts the pending recovery planning process.

NMFS originally determined that a listing of the Southern Resident killer whales was not warranted based on the inability to identify this population unit as a DPS as required by the ESA. Two years later, citing new genetic information and a better understanding of Killer whale population structure and putative evolutionary relationships, NMFS changed its conclusion, arguing that the Resident Group of killer whales (including the Southern Resident, Northern Resident, Southern Alaska, and Western Alaska units) were an unrecognized subspecies, and that the Southern Resident killer whales constitute a DPS of this unrecognized subspecies.

This series of actions raises a number of substantive questions. First, the ESA defines a "species" as any species, subspecies, or "distinct population segment of a species or vertebrate fish or wildlife which interbreeds when mature."[31] The ESA does not identify a DPS of a subspecies as a "species" for the purpose of listing, let alone does it contemplate the listing of a DPS of a taxonomically unrecognized subspecies. Hence, from a purely procedural standpoint, the decision to list the Southern Resident killer whales appears questionable.

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[29] See NEPA Law and Litig. § 5:11.1 (2006)(explaining that a majority of courts and legal scholars agree that designation of critical habitat requires compliance with NEPA).

[30] See San Francisco Chronicle, "5 dozen killer whales believed to be hunting salmon off S.F. coast." Available at http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/01/30/WHALES.TMP (as of February 12, 2007). This article indicates that Puget Sound Killer whales may range as far South as San Francisco, suggesting the species possesses flexible life history characteristics that enable it to adapt to changing environmental conditions. This flexibility may buffer against extinction risks, and it may provide additional insights regarding the relationship of Puget Sound killer whale populations to populations inhabiting the West Coast of the United States.

[31] See 16 U.S.C. § 1532(16).

The ESA requires NMFS to base its listing decisions on the "best available commercial and scientific information." Toward this end, NMFS convened a workshop on, "Shortcomings of Cetacean Taxonomy in Relation to Needs of Conservation and Management,"[32] a title that by itself suggests a interesting bias regarding the purpose and function of taxonomy in biology. During the workshop, the participants broke out into several topical working groups, including a "Working Group on Killer Whales as a Case Study." However, the working group made little progress on the identification of killer whale subspecies. Those participants who thought that more than one species exists also felt that, until the species question can be resolved, it would be appropriate to recognize a series of subspecies to reflect clear differences among types of killer whales. Overall, a majority of participants felt that Resident- and Transient-type killer whales in the Eastern North Pacific probably merit at least subspecies status, although questions of how to delineate sympatric sub-species would remain.

In reviewing this report, and considering the different perspectives of the participants, it is clear that there was no scientific consensus on the taxonomy of killer whales. Further, in the "Report of the Working Group on Species- and Subspecies-Level Taxonomy" from this same workshop, the subspecies concept was referred to as having a "perplexing and confusing history."[33] It was also noted that "its [the subspecies] inherently non-rigorous nature continues to plague taxonomic discourse and, by some views, hinders conservation."[34] Lastly, the report notes that "strict quantitative criteria for subspecies have never been applied to cetaceans."[35] For NMFS to identify Eastern North Pacific Resident killer whales as a "subspecies," and the Southern Resident killer whales as a DPS of the subspecies is at best a questionable application of science in view of the remaining scientific debate on this matter. The record before the agency strongly suggests that NMFS should reevaluate its listing determination, and determine whether Southern Resident killer whales constitute a DPS of a recognizable species in accordance with the express language of the ESA.[36]

Given remaining uncertainties with the listing of killer whales in Puget Sound, NMFS should reconvene its Biological Review Team and clarify whether the best available scientific and commercial information indicates that Southern Resident killer whales are a DPS of the killer whale species. NMFS could easily undertake this assessment in the context of developing an EIS for critical habitat and recovery plan development, and if NMFS determines that the species does not warrant listing, NMFS could reach that conclusion prior to identify specific actions needed to recover the species.

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[32] See Reeves, R.R., W.F Perrin, B.L. Taylor, C.S. Baker and S.L. Mesnick (Editors), *Report of the Workshop on Shortcomings of Cetacean Taxonomy in Relation to Conservation and Management, April 30-May 2, 2004, LaJolla, California*, NOAA-TM-NMFS-SWFSC-363, Southwest Fisheries Science Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, LaJolla, CA (2004).

[33] Id. at Appendix 5.

[34] Id.

[35] Id.

[36] See 16 U.S.C. § 1532(16)(defining the term "species" to mean a DPS of a species).

III. Substantive Comments Concerning Draft Recovery Plan

A. The Plan Fails to Include an Objective Risk Analysis

As WSPA previously stated in its comments on the proposed conservation plan prepared under the MMPA, the draft conservation/recovery plan and listing documents contain a reasonably thorough analysis of killer whale life history and other relevant background information. However, the conservation plan, and now the draft recovery plan, omits key information and analysis. In particular, the draft plan makes broad generalizations about potential risks to the species without any meaningful analysis of these risks. For example, the draft plan portrays the risk of oil spills in Puget Sound as a significant risk to the species; however, the Plan does not adequately analyze the probability of oil spill events in Puget Sound, nor does it adequately consider the myriad of shipping and environmental laws, regulations, policies, and programs that have been successfully implemented to address such risks. As a result, the draft plan does not accurately assess the risk of oil spill events, inviting the agency and other parties to invest limited resources in areas that are comprehensively and successfully addressed.

WSPA remains concerned that many of the statements about risk contained in the draft recovery plan could be interpreted as requiring additional, and potentially costly regulatory actions that are not necessary. Absent an objective, risk-based analysis, NMFS will be unable to prioritize site-specific actions that will achieve species recovery. WSPA and its members have substantial experience conducting these types of analyses – yet another reason for NMFS to engage in an open, collaborative recovery planning process in conjunction with industry and other stakeholders. Such a process would result in the development of a more thorough and balanced recovery plan that the agency and stakeholders could use to effectively achieve species recovery.

B. Comments on Potential Threats to the Species

1. The draft recovery plan does not make use of the best available scientific and commercial information, and should be revised to reflect recently-implemented oil spill response, prevention, and preparedness programs.

NMFS states that due to the volume of shipping traffic in Puget Sound, the possibility of a large spill remains one of the most important short-term threats to killer whales and other coastal organisms in this region.[37] NMFS relies extensively on Neel et al. (1997)[38] in its characterization of oil spill risks in Puget Sound; however, this paper relies on studies that are out-dated, and not reflective of current regulatory programs and recent oil spill information. NMFS also recommends, without analysis or citation, that improvements are needed in spill prevention, response, and preparedness programs in Washington to minimize the effects of oil

[37] See Proposed Recovery Plan at 112.

[38] See J. C. Neel, D. Hart, S. Lynch, S. Chan, and J. Harris, "Oil spills in Washington State: a historical Analysis," WDOE Publication 97-252 (1997).

spills on Southern Resident killer whales.[39] It is unclear how NMFS arrived at these conclusions given that it appears NMFS never consulted with the State of Washington or industry regarding these recommendations.

WSPA disagrees with NMFS' overly-broad characterization of oil spill risk, and believes that a properly-conducted oil spill risk assessment would reveal that the risk of a catastrophic oil spill event in Puget Sound is not reasonably foreseeable in view of existing regulatory measures and programs. As outlined in WSPA's previous comments,[40] and a 2006 report from the Washington Department of Ecology ("DOE"),[41] a host of overlapping, sophisticated, and in some cases, redundant, regulatory measures exist that have dramatically reduced the occurrence and probability of oil spill events in Puget Sound. Over the past 20 years, federal, State, and international programs have undergone continuous refinement and revision in response to continuous evaluation of safety standards. These measures, coupled with industry-initiated practices, have resulted in dramatic decreases in oil spill events from large, commercial vessels in Puget Sound. For example, from 1970's through the 1990's, there was a 94% reduction in average annual oil spill volumes from all vessel types.[42] More recently, during the period from 1998 to 2006, DOE reports that oil spill incidents declined to less than 0.5% of all transits due to improved compliance by large vessels, and increased frequency of inspections.[43] Such information indicates a small and decreasing risk of oil spill events attributable to large, commercial vessels in Puget Sound, Washington.

Aside from available evidence that suggests a small and decreasing risk of oil spill events, a number of regulatory measures were implemented in 2006 to address oil spills in Puget Sound, Washington. In its 2006 annual report, DOE summarizes State spill prevention, preparedness, and response activities that the agency enacted in 2006 to reduce the risk and impact of oil spills in Washington. Such activities include (1) funding of a rescue tug in Neah

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[39] See Proposed Recovery Plan at 141. NMFS also states that "much better contingency planning, more training, and frequent reevaluation of response efforts" are needed improve oil spill response. NMFS provides no basis for this conclusion, nor does the agency identify site-specific actions to address these purported infirmities. The agency also fails to identify objective, measurable criteria industry could implement to judge when purported infirmities are adequately addressed. Judging by the vague criticism of oil spill preparedness measures, WSPA is left with the impression that NMFS does not fully appreciate the scope and requirements of oil spill prevention and response programs in Puget Sound, Washington.

[40] See Letter from Frank Holmes, WSPA, and Mike Moore, Pacific Merchant Shipping Association ("PMSA"), to NMFS (July 3, 2006). In this letter, WSPA and PMSA outline in detail the range of state, federal and international oil spill programs presently being implemented in Puget Sound, Washington. A copy of this letter is included for your reference and inclusion in the administrative record for this proceeding.

[41] See Washington State Department of Ecology, "Spill Prevention, Preparedness, and Response Program 2006 Annual Report," WDOE Publication 07-08-002 (February 2007). We have enclosed a copy of this report for your reference.

[42] See U.S Coast Guard Oil Spill Compendium (2001). Available at http://www.uscg.mil/hq/g-m/nmc/response/stats/aa.htm (as of February 12, 2007).

[43] See Washington State Department of Ecology, "Spill Prevention, Preparedness, and Response Program 2006 Annual Report," at 7-9.

Bay which began service on January 1, 2007; (2) adopting new oil spill contingency plan rules in October, 2006, to make spill management teams and response equipment rapidly available to aggressively respond to spills; (3) updating the Northwest Contingency Plan to coordinate oil spill response efforts between the State and federal government; (4) improving geographic response plans that address areas containing sensitive natural, cultural or economic resources; and (5) establishing a new oil spill transfer program and adopting oil transfer regulations in September, 2006.[44]

The recently-adopted oil spill transfer program constitutes a significant new regulatory measure that expands the number of commercial operations regulated by DOE's oil spill program.[45] Previously, DOE only regulated major maritime shipping operations and large facilities such as oil refineries. The new spill prevention rules provide broad coverage relating to oil that is transferred in bulk over state waters. Under the new transfer rules, DOE recognizes four classes of regulated oil facilities, including (1) major refineries and large facilities; (2) fuel trucks; (3) terminals and fuel vessels; and (4) marinas with fuel docks.[46] Each type of facility has planning and operational requirements specific to its operations. All facilities must also meet new equipment, reporting, preventative maintenance, and operational requirements. To implement the new rules, DOE has also added six new inspectors to oversee oil transfers throughout the state, including in the Strait of Juan de Fuca and Puget Sound.

As the information provided above indicates, a host of regulatory measures address the risk of oil spill events in Puget Sound, Washington. Existing State, federal, international, and industry-initiated processes have reduced oil spill events and risks to extremely low levels. Such regulatory processes are continuously updated, and are implemented with the collaboration of government and industry. Recently-adopted regulatory measures further reduce risk, and bolster prevention and preparedness. In view of these considerations and successes, NMFS should reassess its statements and recommendations regarding Washington oil spill programs. NMFS should also evaluate more recent information from DOE and WSPA prior to recommending site-specific actions and measurable criteria to improve such programs.

2. The draft recovery plan does not identify site-specific actions to address environmental contaminants, nor does it provide a rational basis to require changes in State water quality programs.

(a) PCBs and DDT

The draft recovery plan identifies the bioaccumulation of organochlorines, such as PCBs, DDT, and some other pesticides, as posing the greatest contaminant risk to killer whales, and most of the draft plan's discussion of risks posed by contaminants is focused on these compounds. Since neither PCBs nor DDT remain in use in the Puget Sound region, addressing

[44] Id. at 6-10.

[45] Id. at 6.

[46] Id.

the threats posed by these contaminants is likely to require focused actions and specialized responses. However, the plan fails to include such site-specific actions to address these concerns. For example, Recovery Action 1.2.2 simply calls for minimizing continued input of contaminants to the environment, and Recovery Action 1.2.2.1 calls for revising water and sediment quality standards and upgrading wastewater treatment systems and pretreatment programs.[47]

The draft plan does not provide a rational basis to require wholesale revisions to water quality standards and wastewater treatment systems. The draft plan also fails to explain how these changes would address PCBs and DDT - substances which persist in the environment but as already noted, are no longer in use. Similarly, no case has been made for sweeping changes to water quality and wastewater treatment standards to respond to emerging contaminants, like PBDEs. NMFS should focus any contaminant-related conservation measures on specific responses to the contaminants of concern.

(b) PAHs

WSPA concurs with NMFS' assessment that compounds such as PCBs and DDT are more likely to result in affects to killer whales and their primary prey then PAHs which have not been shown to adversely affect killer whales or their prey. Trophic level increases of PAHs through biomagnification have not been observed in aquatic ecosystems because PAHs are commonly metabolized. Consequently, PAHs are not available to top predators such as killer whales. In any case, fish species with the highest potential to be contaminated are bottom fish, which contribute very little to the Southern Resident killer whale diet.[48] These conclusions are supported by research conducted by the British Columbia Department of Fisheries and Oceans on contaminant levels in Southern Resident killer whales, which found extremely high levels of PCBs and DDTs and lower levels of dioxins and furans, but did not report finding PAHs.[49]

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[47] See Draft Recovery Plan at 137-138.

[48] See Draft Recovery Plan at 21 (noting that salmon are the preferred prey of resident killer whales).

[49] See M. Schmidt and P. Johnson, "Toxics in the Puget Sound Food Web," People for Puget Sound (2001). According to this report, the Southern Resident killer whale population has a high level of chemical contamination but the detectable chemicals have not been reported to include PAHs. Research by the British Columbia Department of Fisheries and Oceans found PCBs and DDTs at extremely high levels, lower levels of dioxins and furans, and higher levels of PCB and DDT in males than females, suggesting females excrete over 60% of their chemical residues through nursing. They did not report finding PAHs.

3. Available scientific and commercial information indicates that noise associated with commercial cargo vessels does not harm killer whales, and NMFS has failed to consider the cost of regulatory restrictions on cargo vessel transiting through Puget Sound, Washington.

The draft recovery plan suggests that vessel noise may be detrimental to killer whale survival by impairing foraging and other behavior patterns. NMFS recommends that the presence and activity patterns of non-whale-watching vessels in the vicinity of Southern Resident and other killer whales should be evaluated to determine their potential effect. NMFS also suggests the need to restrict vessel traffic or establish regulations regarding vessel activity in the vicinity of killer whales.

The impacts of vessel noise on killer whales, particularly noise associated with large cargo vessels, is poorly understood, and threshold levels at which underwater sounds become harmful are unknown. In 2003 the National Research Council ("NRC") concluded that no documented evidence exists of ocean noise being the direct physiological agent of marine mammal death under any circumstances.[50] The long-term effects of ambient noise on marine organisms are even less well understood.

No evidence currently exists to suggest that noise associated with large cargo vessels or oil tankers causes harm to killer whales. As NMFS explains in the draft recovery plan, large cargo vessels produce low frequency sound in the range of 5 to 500 Hz.[51] Conversely, killer whale hearing sensitivity ranges from 1 to 120 kHz with peak sensitivities from 20 kHz to 50 kHz - well above the range of sound produced by commercial cargo vessels.[52] These data indicate that noise associated with commercial cargo vessels and oil tankers does not impact the species.

Container and tanker vessel movements are highly regulated by numerous federal laws and international treaties. Vessel movements and shipping lane operations in general implicate important national security considerations and international agreements. NMFS' legal authority to regulate in this complex legal environment is at best unclear. Any proposed recovery actions contemplating regulation of container and tanker vessel movements should carefully evaluate these issues through discussions with the State Department, the Defense Department, and the shipping industry to ensure that any recovery plan or recommendations for regulatory actions reflect a realistic assessment of actions that can in fact be implemented.

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[50] See National Research Council, *Ocean Noise and Marine Mammals*, Committee on Potential Impacts of Ambient Noise in the Ocean on Marine Mammals (2003).

[51] See Draft Recovery Plan at 108 (citing National Research Council).

[52] Id. at 109.

Establishing regulations that restrict commercial vessel operations in Puget Sound, Washington, could have significant economic and safety implications for vessel traffic in this region. Safe and efficient movement of cargo to the Port of Seattle, Port of Tacoma, and oil refineries is an important regional issue, with potential national and international implications. NMFS should avoid implementing programs or regulations that impact commercial shipping unless and until NMFS evaluates in detail the legal, social, economic, and environmental impacts of such programs or regulations.

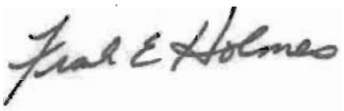
IV. Summary and Recommendations

In view of the considerable uncertainty surrounding killer whale conservation and recovery, WSPA urges NMFS to postpone issuance of a final recovery plan, and engage in a more open, collaborative recovery planning process consistent with current agency policies and practices. Doing so will help insure that NMFS fully considers the environmental and economic impacts of killer whale recovery actions consistent with the legal requirements of the ESA.

WSPA encourages NMFS to comply with NEPA by preparing an EIS analyzing the social, economic and environmental impacts of critical habitat designation and recovery plan activities. Doing so will inform agency decisionmaking, and it will enable full and complete public disclosure of the potential impacts of agency actions. WSPA stands ready to assist NMFS in this matter, and looks forward to playing an important role in the conservation of marine resources in Puget Sound, Washington.

Thank you for the opportunity to provide comments and recommendations on the draft recovery plan, and we appreciate your inclusion of these materials in the administrative record for this proceeding. Please feel free to contact me at (360) 352-4506 if you have any questions regarding these comments or recommendations.

Sincerely,



Frank E. Holmes, Northwest Manager
Western States Petroleum Association

Enclosures

Cc: Vice Admiral Conrad Lautenbacher (Ret.), NOAA Administrator
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